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Vardaman S. Dunn

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Matthew Harper, Jr.

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Mississippi Law Journal

VOLUME XXIX DECEMBER, 1957 NUMBER 1

VENUE IN THE CIRCUIT COURT

*Vardaman S. Dunn**

I. GENERAL DISCUSSION

A. *Scope of Article*

The general statute applicable to actions in the circuit court is the basis of the discussion under this subdivision.[1] It does not include, except where analogous, the subject of venue in the chancery court, justice of the peace courts and special tribunals, or under special statutes dealing with particular actions, suits or proceedings which are otherwise provided for.[2]

B. *Definition of Terms Used*

In order to avoid confusion and repetition, terms used herein are defined as follows:

Venue: Has reference to the permissible place of commencing and maintaining suit, as distinguished from jurisdiction of the subject matter.

Local Defendant: Means a defendant, individual or corporate, domiciled or residing in the county where the suit is commenced and sought to be maintained.

Non-local Defendant: Means a defendant, individual or corporate, not domiciled or residing in the county where the suit is commenced and sought to be maintained.

Foreign Defendant: Means a defendant, individual or corporate, who is a non-resident of the state.

C. *Construction of Statutes*

With few exceptions, the statutes fully cover the subject of venue,

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[1]Miss. Code Ann. § 1433 (1942).

[2]Except where otherwise provided, actions on the law side of the county courts of which the circuit court has concurrent jurisdiction, are controlled by the circuit court venue statutes; those on the chancery side by the chancery venue statutes. Miss. Code Ann. § 1606 (1942)

and the common law rules have no application.[3] The legislature, so long as it does not unreasonably discriminate between litigants or classes of litigants, is the sole judge of the venue of actions and may fix it in one or more places according to its judgment of convenience and justice.[4] The statutes have been construed reasonably and without any tendency on the part of the court toward that strictness of interpretation so often found in connection with procedural acts, but due regard has been given to legislative intent and sound justice.

D. *The General Statute*

The general statute that controls the venue of a vast majority of cases in the circuit court provides as follows:[5]

> "Civil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant or any of them may be found, and if the defendant is a domestic corporation, in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided, and except actions of trespass on land, ejectment, and actions for the statutory penalty for cutting and boxing trees and firing woods and actions for the actual value of trees cut which shall be brought in the county where the land or some part thereof, is situated; but if the land be in two or more counties, and the defendant resides in either of them, the action shall be brought in the county of his residence, and in such cases, process may be issued against the defendant to any other county. If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, or if a public officer be sued in any such action, out of the county of his household and residence, although a surety or sureties, or some sureties, on his bond, or other joint defendant, sued with him, be found or be subject to action in such county, the venue shall be changed, on

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[3]Also, the rule is that where a special statute deals with a special or particular subject, the special and particular statute controls over the general venue statute. See Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). More or less comprehensive statutory venue provisions have been in existence in the state from the earliest times. The statute in the form found in the Code of 1930 was enacted in 1918 (Miss. Laws 1918, c. 149) to insert the clause providing for venue if actions against domestic corporations and making special provisions for public officers. In 1940, the statute was amended to add a provision covering public officers, but otherwise it remained the same (Miss. Laws 1940, c. 248). With the substantial re-enactment of this statute, legislative sanction has been given to the judicial interpretation prior to 1940.

[4]Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930); Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930).

[5]Miss. Code Ann. § 1433 (1942). Special statutes control over the general statute. Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947). In rem actions, other than those specified, are excluded. See Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

his application, before the jury is impaneled, to the county of his household and residence, whether such suit is filed before or after such officer's term of office has expired."[6]

E. *Limitation of Statute — In General*

By its express terms the general statute is limited to "civil actions[7] of which the circuit court court has original jurisdiction." Thus, it is held that the statute has no application whatever to causes of action within the jurisdiction of justices of the peace; so a public officer, sued in a justice court, is not entitled to invoke the statute on appeal.[8] However, the express limitation must, of course, give way to special conformity statutes by which the general circuit court act is expressly made to control.[9]

II. TIME FOR FIXING VENUE

The venue statute provides that actions shall be "commenced" in certain designated places. Another section of the code provides that "an action shall, for all purposes, be considered to have commenced and be pending from the time of the filing of the declaration, if a summons shall be issued thereon for the defendant, and, if not executed, other like process, in succession, may be issued, in good faith, for the defendant."[10] Another section provides for the issuance of alias, pluries and testatum writs if the original process be returned "not found."[11]

Accordingly, venue is fixed as of the commencement of the action and not necessarily when process is served. Thus, where the declaration is filed against a defendant domiciled[12] at the time in the county where suit is instituted, the territorial jurisdiction of the court immediately attaches, subject to the issuance in good faith of process,[13] and it may not be defeated by the act of the defendant in changing his domicile and moving

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[6]Miss. Laws 1940, c. 248, re-enacted the statute exactly as it appears in the Code of 1930, with the addition of the phrase: "whether such suit is filed before or after such officer's term of office has expired."

[7]For distinction between civil and criminal actions, see Annot., 102 A. L. R. 397 (1936). See, also M. & O. Ry. Co. v. State, 51 Miss. 137 (1875).

[8]Womack v. Richardson, 168 Miss. 748, 151 So. 175 (1933). See Yalabusha County v. Carbry, 6 Miss. 529 (1844), involving an appeal from a police court, wherein the same result was reached.

[9]For example, the venue in actions in the county court of which the circuit court has concurrent jurisdiction (Miss. Code Ann. § 1606 (1942)), and, in certain features, chancery suits (Miss. Code Ann. § 1276 (1942); Griffith, Mississippi Chancery Practice § 158 (2d ed. 1950)), are controlled by the circuit court act. In chancery generally, different venue provisions apply. Brashier v. O'Connor & Sons, 181 Miss. 872, 180 So. 67 (1938); McRae v. Ashland Plantation, 187 Miss. 350, 192 So. 847 (1940).

[10]Miss. Code Ann. § 1463 (1942). This statute is expressly limited to actions in the circuit court and applies unless otherwise provided.

[11]Miss. Code Ann. § 1850 (1942).

[12]Excepting domicile, the defendant must be found by service of process.

[13]Miss. Code Ann. § 1463 (1942).

out of the county before process can in due course be served upon him.[14] The plaintiff in such cases may have a testatum writ[15] or in some instances an attachment.[16]

III. CLASSES OF LITIGANTS COMPARED – IN GENERAL

Three classes of litigants are expressly dealt with in the general statute: (1) individuals, (2) domestic corporations, and (3) public officers, and except as to local actions, the rights and liabilities vary. The classification has been sustained against constitutional objections.[17] Actions are classed as either transitory or local, depending upon the subject matter.[18]

IV. TERRITORIAL JURISDICTION – IN GENERAL

Generally speaking, an action may be commenced in any county where any proper party defendant may be found. If process is served upon a defendant so found, the court is said to acquire territorial jurisdiction and process may issue to any other county for a joint party defendant.[19] On such state of the record the court may proceed to a determination of the action, unless it is divested of venue by the assertion on behalf of a party entitled thereto of the right of removal. On the other hand, if no proper party defendant is found and served within the county by one of the methods authorized by law, service of process upon a non-local defendant, regardless of his classification, will not vest the court with territorial jurisdiction, and a default judgment based upon the ineffective service is voidable, if not void.[20] The defendant, or defendants, in such case may take either of three courses of action: (1) he may appear and obtain a change of venue, if he is one of a class authorized to

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[14]Andrews v. Powell, 41 Miss. 729 (1868).

[15]Miss. Code Ann. § 1850 (1942). Andrews v. Powell, supra note 14. An instance of this type will rarely arise. Should it arise, the case cited should be consulted for the form and showing necessary for the testatum writ. An order of court is necessary to support the testatum writ and a showing and record must be made of the facts of removal of the defendant after commencement of the suit.

[16]McNair v. Kaiser, 62 Miss. 783 (1885).

[17]Pan American Petroleum Corp. v. Pate, 157 Miss. 822 (1930) (officers); Morrimac Veneer Co. v. McCalip. 129 Miss. 671, 92 So. 817 (1922) (domestic corporations): Sandford, Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), citing Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927), and Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 49 A. L. R. 713 (1926) (foreign and domestic corporations); Clarke v. Louisville & N. R. Co., 158 Miss. 287, 130 So. 302 (1930) (foreign corporations—railroads).

[18]See Subdivision VIII.

[19]Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), and cases cited throughout this article.

[20]Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930); Cook v. Pitts, 111 Miss. 893, 74 So. 777 (1917); Campbell v. Triplett, 74 Miss. 364, 20 So. 844 (1896); Wooley v. Bowie, 41 Miss. 553 (1867); Pate v. Taylor, 66 Miss. 97, 5 So. 515 (1889); Spain v. Winter, Walk. 152 (Miss. 1824); McLeod v. Minor, 42 Miss. 517 (1869); Bank of Vicksburg v. Jennings, 5 How. 425 (Miss. 1841); Andrews v. Powell, 41 Miss. 729 (1868).

assert the right of removal,[21] (2) he may suffer judgment by default and thereafter appeal directly[22] or (3) he may suffer judgment by default and thereafter set it aside in a collateral attack, as by proceeding to quash a writ of execution issued thereunder.[23] On the other hand, territorial jurisdiction may be waived by the entry of a general appearance and by pleading to the merits.

V. WHERE DEFENDANT FOUND

A. *Classification of Litigants*

The general statute is mandatory in requiring that suit "shall be commenced in the county in which the defendant or any of them may be found." Provisions for domestic corporations are also found in this statute. Generally speaking, an individual, regardless of his class may be found in any county in which he is physically present for the service of process or in the county of his household and residence. A domestic corporation may be found in the county of its domicile or where the action accrues. Foreign corporations that have qualified to do business in the state, although not expressly included within the statute, may, by analogy, be found in its established Mississippi domicile or where the cause of action accrues. Foreign corporations that have not qualified may, by reference to another section of the code, be found wherever it has an agent subject to process. Once found a defendant may or may not be entitled to a removal of the action to another county, depending upon the class to which he belongs and the circumstances. All of these matters are later developed at some length in this article. The discussion under the present heading excludes the question of the maintenance of venue by the joinder of a local co-defendant. It has to do only with the circumstances under which a defendant may be found so as to confer venue upon the court by service of process upon him, and without regard to any possible removal rights.

B. *Individual Defendants — Where Found*

An individual defendant may be found in either one of two places.

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[21]In Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917), it was held that the defendant might obtain a change of venue to the county of his domicile.

[22]Andrews v. Powell, 41 Miss. 729 (1868), holding that where process is served on the only defendant, an individual, in a county other than that in which suit was commenced, it will not be presumed in aid of a court of general jurisdiction that the defendant was domiciled in the county when suit was commenced, but the cause will be reversed. Wooley v. Bowie, 41 Miss. 522 (1867) (reversed and dismissed).

[23]In Perry v. Nolan & Maris, 159 Miss. 384, 131 So. 252 (1930), the question arose at a subsequent term in a proceeding by the defendant, against whom a default judgment had been entered, to quash a writ of execution issued under the judgment and to vacate the judgment as utterly void. On appeal from the action of the lower court in denying the relief sought, the cause was reversed. It was held that "the judgment was voidable, if not void, in this state of the record . . . . [T]he court had no jurisdiction" over the defendant.

He may be found in the county of his domicile wherein he maintains his usual place of abode, [24] since, if he is not physically present, jurisdiction may be obtained by secondary service;[25] or in the county where he is served personally with the process of the court, provided that he is served while physically present within the territorial boundaries of the county where the suit is pending and provided further that his presence is not the result of fraud or improper device chargeable to the plantiff. He may not be found elsewhere.[26]

C. *Fraudulent Device in Finding Defendant*

Omitting for the present the question of fraudulent joinder of parties, attention is here focused upon the subject of venue or jurisdiction where the element of fraud appears in finding the defendant in the county where suit is pending.

The statute merely fixes the venue in the county where the defendant is found. It would follow that insofar as the statute is concerned jurisdiction would not be affected by the method employed in finding the defendant. However, where fraud appears the court is vested with powers wholly independent of statute. Thus, it is held that a court will not take jurisdiction in a civil case based on a service of process on a defendant who is brought within the reach of its process wrongfully, fraudulently, by deceit or any other improper device; provided that the wrongful conduct is chargeable to the plaintiff.[27] The rule is based not on a lack of jurisdiction but on the view that it is improper for a court to exercise a jurisdiction so obtained. Such conduct amounts to a fraud upon the defendant and upon the jurisdiction of the court.[28] On the other hand, a defendant may voluntarily submit to the jurisdiction of the court by entering the county for the sole purpose of receiving process; but where collusion between the plantiff and the appearing defendant is involved, jurisdiction so obtained will not extend to a joint defendant.[29]

D. *Domestic Corporations*

While in some respects foreign corporations are governed by the same rules, the subject discussed in this and immediately succeeding sections is restricted to purely domestic corporations.

The general statute provides specially for service on domestic corporations as follows: " . . . and if the defendant is a domestic corporation,

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[24]Individual domicile is discussed later. See subdivision VI G.

[25]Miss. Code Ann. § 1859 (1942).

[26]See note 20 supra.

[27]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937); McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940).

[28]Nicholson V. Gulf M. & N. R. Co., supra note 27.

[29]Ibid.

in the county in which said corporation is domiciled, or in the county where the cause of action may occur or accrue except where otherwise provided . . . ."

It is quite clear from the statute itself that a plaintiff has the privilege of commencing his action and maintaining venue against a domestic corporation either in the county of its domicile or where the cause of action may occur or accrue. In other words, such defendant may be found within the meaning of the statute in either of the places mentioned.[30] But there remains yet to be solved, by reference to the decisions, several troublesome questions. They are those which relate to the exclusiveness of the enumerated places, to location of the corporate domicile and to the place where a cause of action may occur or accrue.

(1) *Exclusiveness of Specified Counties*

Despite the loose dictum to be found in some of the decisions indicating a contrary view,[31] it is now well settled that a domestic corporation may be found in no other county save that of its domicile or where the cause of action may occur or accrue. Thus, it is held that a domestic corporation may not be found for venue purposes in a foreign county merely by reason of the fact that its agent is physically present or residing therein, or that it is there exercising its franchise by conducting a branch of its business in charge of its agents.[32] In this respect venue of the domestic corporation differs from that of a non-qualified foreign corporation.

(2) *Location of Corporate Domicile*

Like an individual,[33] a domicile is imposed upon a domestic corporation at birth. One section of the code chapter on corporations[34] re-

[30]Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931); Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931); Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).

[31]See Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920) and comment upon that case in Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925).

[32]Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916). It is interesting to note that this case was decided under the provisions of the Code of 1906. At that time, the general circuit court venue statute (Code 1906, Sec. 707) did not mention a corporation but laid the venue as to all defendants in the county where *found.* The result was reached by reference to the code section (Code 1906, Sec. 3932) which is now Miss. Code Ann. § 1866 (1942), having to do with process generally. The court concluded that the legislative intent was to place the venue of domestic corporations in the county of its "principal place of business," which was held to be synonymous with "domicile." It was reasoned that the legislature intended to grant immunity from the expense and inconvenience which would result from the sending of the corporate records and witnesses to distant counties and to compensate for the denial of the right of removal accorded only to individuals. See also: Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930); McLeod Lumber Co. v. Manassa Lumber Co., 180 Miss. 552, 178 So. 83 (1938); Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[33]See 17A Am. Jur., Domicile § 3.

[34]Miss. Code Ann. § 5310 (1942).

quires a specification of domicile to be included in the charter. Another section[35] requires that every domestic corporation maintain an office in the county of its domicile in charge of some officer or a designated resident agent upon whom process may be served, and in default thereof, the secretary of state is made the process agent.

It follows from these statutes that the legal domicile of the corporation is fixed when the charter is granted. There can be only one domicile at any given time, and once established, the domicile remains until a new one is acquired.[36]

A corporation, unlike an individual, may not change its domicile at will where it is fixed by law, as in this state, but only as authorized by law.[37] Thus, the domicile may be changed by amendment of the corporate charter[38] or by appropriate corporate action, as by resolution, where such method is authorized by the charter;[39] provided, however, that the formal change is followed or accompanied by actual removal from the county of the original domicile to that of the new.[40] The mere exercise of its franchise in a county foreign to that of its domicile does not confer venue on such county.[41] It would seem to follow that in the absence of a formal change, the charter-domicile would remain the exclusive venue-domicile even if the corporation conducts its principal place of business in a foreign county.[42]

(3) *Where Cause May Occur or Accrue*

The general statute provides in the alternative that suit shall be

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35Miss Code. Ann. § 5319 (1942).

36Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).

3718 C. J. S., Corporations § 176 (c).

38Miss. Code Ann. § 5323 (1942).

39Estes v. Bank of Walnut Grove, 173 Miss. 499, 159 So. 104 (1935).

40Ibid.

41Plummer-Lewis Co. v. Francher, 111 Miss. 656, 71 So. 907 (1916).

42The case of Plummer-Lewis Co. v. Francher, supra note 41, was decided at a time when the general venue statute made no special provision for corporations. The question was whether, under the statute as it then existed, a domestic corporation might be found for venue purposes in a county in which it exercised its franchise through a branch office but which maintained its principal place of business in another county designated as its domicile by charter. By reference to the general statute on process, the court interpreted the legislative intent as being that a domestic corporation was subject to suit only in the county of its "principal place of business" which was held to be synonymous with "domicile." Since that case, the general venue statute was amended to take its present form in which the term "domicile" is used. As pointed out in the Plummer-Lewis case, the spirit of the law was to exempt domestic corporations from the expense and embarrassment of sending their records and agents into foreign counties to defend suits and in this respect to compensate for the denial of the right of removal given an individual. However, it is quite apparent that a domestic corporation has, under the recent statutes, a right to select its domicile by compliance with the statutory requirements, and this is so despite the fact that its "principal place of business" is maintained elsewhere. Insofar as the Plummer-Lewis Co. case is authority for the proposition that venue is obtainable by "principal place of business" where such place does not coincide with the charter-domicile, it is nullified by the amendment of the venue statute and enactment of Sec. 5319 in 1928.

commenced against domestic corporations in the county where "the cause of action may occur or accrue."[43]

Recognizing a diversity of opinion upon the subject,[44] our court has defined the term "cause of action" as referring to "a right to institute and carry on an action," and not to the facts giving rise to an action. It is further held that the term "occur" and the term "accrue" are used to mean the equivalent of "accrue," which, in turn, is defined as meaning "to come into existence as an enforceable claim; to vest as a right."[45]

A cause of action occurs or accrues within the meaning of the statute when,[46] and in the locality where, the right to institute suit comes into existence. Such right can mature only in the county where the final act occurs.[47]

In personal injury actions, the cause of action accrues in the county where the injury is inflicted or the person of the injured party is impinged upon. Several decisions illustrate the rule. In an action for damages resulting from drinking a beverage containing foreign substances, the venue is in the county where the beverage is consumed and not where it is bottled.[48] In actions for negligence producing death, the venue is laid in the county where the injury is inflicted and not where the negligent omission originates[49] or where death subsequently results.[50] In this latter respect, the right to sue accrues the instant that the injury is inflicted and not before, although the cause of the injury may have originated elsewhere and at a different time.[51] Subsequent death may increase

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[43]Failure to designate a process agent under Sec. 5319 (Miss. Code Ann. § 4140 (1930)) does not prevent venue being maintained in the accrual county. In this respect domestic and foreign corporations are governed by different rules. Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[44]The diversity was referred to in Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936). The different shades of meaning that may govern, depending upon the subject under consideration, are referred to in Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[45]Grenada Bank v. Petty, supra note 44; Forman v. Miss. Publishers Corp., 195 Miss. 90, 14 So.2d 344 (1943).

[46]Cox v. American Freehold & L. Mfg. Co., 88 Miss. 88, 40 So. 739 (1906); Johnson v. Pyles, 19 Miss. 189 (1848); Central Trust Co. v. Meridian Light & Ray Co., 106 Miss. 431, 63 So. 575, 51 L. R. A. (n. s.) 151 (1913); Graham McNeil Co. v. Scarbrough, 135 Miss. 59, 99 So. 502 (1924); Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 157 So. 474 (1934), cited in Grenada Bank v. Petty, supra note 45.

[47]See 133 A. L. R. 260 and case cited notes 48 - 54 infra.

[48]Coca-Cola Bottling Co. v. Cox, 174 Miss. 790, 165 So. 814 (1936).

[49]See Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977 (1883). This case involved a question of conflicts of laws. Said the court: "Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and vice-versa; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi." See also Ala. G. S. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163 (1892), wherein the Mississippi rule is referred to and followed. As pointed out and demonstrated in 133 A.L.R. 260, the rule is in accord with the great weight of authority.

[50]See 133 A.L.R. 260.

[51]Ibid.

the damages and alter the parties entitled to bring and maintain suit, but the place where the cause of action accrued is not changed.[52]

Other cases involving tort actions illustrate this rule. Thus, in an action for malicious prosecution, the venue is in the county where the plaintiff is tried and acquitted and not where he is taken into custody, since the right of action does not come into existence until the prosecution terminates in the plaintiff's favor.[53] In an action for damages resulting from the pollution of a stream by the defendant's factory, the venue is in the county where the damage is caused to the plaintiff's property and property rights and not where the obnoxious matter is deposited in the stream. It is observed in this case that although the "cause of injury" originated in another county, it was harmless until the damage resulted therefrom.[54] An action for libel contained in a newspaper occupies a special field, since it is held that the action accrues where the paper is published and not elsewhere.[55]

This statement of the rule is not limited to tort actions, and no reason appears why the test should not apply to actions on or for the breach of contract. Only one decision has been found from this jurisdiction specifically treating the subject in reference to venue. It is held that a cause of action for breach of contract accrues in the county where performance is due. In a claim for breach of a contract of sale and delivery, the cause accrues in the county where the article was to have been delivered and installed.[56]

E. *Foreign Corporations*

(1) *In General*

For venue purposes corporations organized outside of the state may be classified as domesticated corporations, qualified corporations and non-qualified corporations. The corporations that have become domesticated are specifically provided for by statute.[57]

Foreign corporations are not expressly mentioned in the general venue statute.[58] The process statute applicable generally to foreign corporations makes no direct reference to venue as such, but provides that "Process may be served upon any agent of said corporation found within

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52Ibid.

53Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

54Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933).

55Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

56See Southern Wholesalers v. Stennis Drug Co., 214 Miss. 461, 59 So.2d 78 (1952). See also 92 C.J.S., Venue § 30.

57Miss. Code Ann. §§ 5339-42 (1942). Such corporations are placed on the same basis as domestic corporations, but they remain non-residents within the provisions for attachment and removal to the federal court. See Southern Motor Express Co. v. Magee Truck Lines, 181 Miss. 223, 177 So. 653, 114 A.L.R. 1377 (1937).

58Miss. Code Ann. § 1433 (1942).

the county where the suit is brought."[59] Another section provides that all foreign corporations doing business in this state shall be subject to suit to the same extent as domestic corporations.[60] The corporation act of 1928 provides for qualification of foreign corporations in this state and the appointment of a resident process agent.[61] This statute does not require the foreign corporation to maintain an office in charge of the process agent or officer or other agent, as in the case of domestic corporations.[62] There is no statute specifically fixing the domicile of foreign corporations, as in the case of domestic corporations. Bearing these statutes and comments in mind, a discussion of the venue rules governing the different classes of foreign corporations follows.

(2) *Qualified Corporations*

Foreign corporations doing business in this state are required by statute to file with the secretary of state a copy of the charter and a written power of attorney "designating the secretary of state or in lieu thereof an agent" upon whom service of process may be had in the event of suit.[63]

In view of this statute and the constitutional limitations against discrimination, it is held that the qualified foreign corporation has the same rights and is subject to the same disabilities as domestic corporations insofar as venue is concerned. The rule has been stated as follows:[64] where a foreign corporation, doing business in the state, has fully qualified under the act by filing its charter and appointing a resident agent for the service of process, it stands, as to venue, in the identical position of a domestic corporation. It may be sued and the venue sustained either in a county where the cause of action occurred or accrued or in the county of its domicile where its designated agent resides. If sued where the cause of action accrues, process may issue to and be served upon the process agent in another county where he resides. In other words, it may be found in either of the places where a domestic corporation may be found, and, as in the case of a domestic corporation, it may not be found elsewhere merely because an agent is served with process or mere-

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[59]Miss. Code. Ann. § 5346 (1942).

[60]Miss. Code Ann. § 5345 (1942).

[61]Miss. Laws 1928, c. 90, Miss. Code Ann. § 4140 (1930); Miss. Code Ann. § 5319 (1942).

[62]Miss. Code Ann. § 5319 (1942).

[63]Ibid.

[64]See Sandford v. Dixie Const. Co., 157 Miss. 626, 128 So. 887 (1930), followed in Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344 (1943).

ly because it may be found exercising its franchise in a county other than that of its domicile.[65]

VI. RIGHT OF REMOVAL OR DISMISSAL

If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence and in a court having no venue, the venue shall be changed, on his application before the jury is impaneled, to the county of his household and residence.[66] Since the act of 1940, a corporate objection to venue, if sustained, will result in a transfer of the case and not a dismissal as was the case before.[67]

A. *Public Officers*

A public officer is given the right of removal, but his position is different from that of an ordinary individual in that lawful joinder of a local defendant does not defeat the right of removal.[68] The provision as to public officers was to prevent taking the officer away from his jurisdiction and thus interfering with the administration of his official duties.[69] However, the statute extends the right to suits filed after the officer's term of office expires.[70] The provision is not invalid as discriminatory, since there is a substantial reason for the special classification.[71]

Executors and administrators are not public officers in the sense of

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[65]Accord, McLeod Lumber Co. v. Manassa Timber Co., 180 Miss. 552, 178 So. 83 (1938), holding that where the action accrues without the state, the venue cannot be maintained in the county of the plaintiff's residence, but must be laid in the county where the corporation has its place of business and where its process agent resides. See also Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931), where the Sandford case referred to Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933). The rule in the Sandford case is based upon a consideration of Miss. Code Ann. §§ 495, 4140 (1930) (Miss. Code Ann. §§ 1433, 5319 (1942)) and the constitutional limitation against discriminatory legislation as discussed in Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927) and Hanover Fire Ins. Co. v. Carr, 272 U.S. 494, 49 A.L.R. 713 (1926). The conclusion is that any other construction of the statutes would render the same unconstitutional as an unlawful discrimination between domestic and foreign corporations. Consideration was also given to Miss. Code Ann. § 4166 (1930) (Miss. Code Ann. § 5345 (1942)), declaring that all foreign corporations doing business in this state shall be subject to suit here to the same extent that corporations of this state are, as applying primarily to substantive matters but as indicating the legislative policy. The law was expressly left the same as to non-qualified corporations. Expressly excluded from decision were questions arising as to insurance companies, railroad companies and companies having designated only the secretary of state as process agent.

[66]Miss. Code Ann. § 1433 (1942).

[67]See subdivision VI B.

[68]Miss. Code Ann. § 1433 (1942). Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950). Prior to amendment in 1926 (Miss. Laws 1926, c. 155), the public officer was on the same footing as an ordinary citizen. See Dean v. Brannan, 139 Miss. 312, 104 So. 173 (1925); State v. Cloud, 146 Miss. 642, 112 So. 19 (1927).

[69]Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480, suggestion of error overruled 128 So. 870 (1930).

[70]Miss. Code Ann. § 1433 (1942).

[71]See note 69 supra.

this statute and they stand on the same footing as individuals for venue purposes.[72]

However, the right of a public officer to trial in the county of his household and residence is not absolute in all circumstances. The right does not prevail against the right of a co-defendant to a change of venue because of local prejudice,[73] and it is to be noted also that the right applies only in circuit court actions where the circuit court has original jurisdiction. Thus, a public officer sued in a justice court cannot avail himself of the right of removal on appeal to the circuit court.[74] Also, where other specific statutes apply, such specific statutes control over the general venue statute. Thus, it is held that the right of removal does not exist in a special proceeding against the officer by motion for failure to levy execution, since the statute[75] requires presentation before the court to which the execution is returnable.[76]

B. *Corporations*

In reference to the right of removal, the statute makes no reference to corporations. It has been held that corporations have no right of removal of a cause. The result is that on valid objection to venue by a corporate defendant, the suit is simply dismissed without prejudice.[77] But in 1940, a general statute, applicable to all defendants, was enacted, whereunder a case brought in the wrong venue may not be dismissed but it "shall, by the court, be transferred to the venue to which it belongs."[78]

C. *Individuals — Basis of Right*

The individual defendant may assert the right to a change of venue to the county of his household and residence whenever there is no co-defendant, properly joined, against whom the venue is lawfully maintainable. For example, when the plaintiff states a cause of action in good faith against a local co-defendant, whether individual or corporate, properly joined as a defendant in a joint cause of action the non-local defendant has no right of removal.[79] The same rule applies whenever the

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[72]Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

[73]Miss. Code Ann. § 1443 (1942); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[74]Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933); Yalabusha County v. Carbry, 6 Miss. 529 (1844).

[75]Miss. Code Ann. § 4244 (1942).

[76]Womack v. Richardson, 168 Miss. 347, 151 So. 173 (1933).

[77]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937).

[78]Miss. Code Ann. § 1441 (1942).

[79]Daniel v. Livingston, 168 Miss. 311, 150 So. 622 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920); Miss. Power & Light Co. v. Lowe, 179 Miss. 377, 175 So. 196 (1937); Dean v. Brannon, 139 Miss. 312, 104 So. 173 (1925); Myers v. Vinson, 212 Miss. 85, 54 So.2d 168 (1951).

co-defendant, properly joined, is made subject to the venue by the statutes, as when a corporation is joined and suit is in the county where the cause of action against it accrued or where a foreign individual co-defendant, in the absence of fraud, is physically found and served with process in the county.[80]

D. *Procedure for Removal — Waiver*

The change of venue is accomplished by "application," which generally takes the form of a motion. The application must be filed and presented before the jury is impaneled,[81] provided the condition has then arisen. In the event that such application is improperly granted, the plaintiff may file a motion to remand. This motion is filed in the court to which the action is removed and the refusal of that court to sustain the motion may be reviewed on appeal. In such cases the supreme court will reverse and may remand to the court in which the action was improperly tried with directions to transfer to the court having the proper venue.[82]

It is held that the right of removal may be asserted and the action removed whenever the condition therefor arises,[83] unless the right has been waived.[84] From this it follows that the application need not, under all circumstances, be made before the jury is impaneled or before a plea to the merits is interposed. The different situations which may be presented are discussed below. But venue is a personal privilege and may be waived.[85]

If the right to a change of venue is apparent from the declaration or proceedings, the application should be made promptly and before any plea to the merits is filed. Ordinarily a plea to the merits is a waiver,[86] but if timely application is made the court may allow the plea to be withdrawn and the application for change of venue filed.[87] Permission to withdraw a plea to the merits in this connection is discretionary with

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[80]See note 79 supra; also Pan American Petroleum Corp. v. Pate, 157 Miss. 822, 126 So. 480 (1930); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920), and cases cited therein.

[81]Miss. Code Ann. § 1433 (1942).

[82]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933).

[83]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Tucker v. Gurley, 176 Miss. 708, 170 So. 230 (1936).

[84]Howard v. Ware, supra note 83; Indianola Cotton Oil Co. v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

[85]Catlett v. Drummond, 113 Miss. 450, 74 So. 323 (1917); Stanley v. Cruise, 134 Miss. 542, 99 So. 376 (1924); Halliburton v. Crichton, 147 Miss. 621, 111 So. 743 (1927); Indianola Cotton Oil Co. v. Crowley, supra note 84.

[86]Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935); King v. Ainsworth, 83 So.2d 93 (Miss., 1955).

[87]Grenada Bank v. Petty, supra note 86.

the trial court.[88] However, under the more recent pleading statute[89] the venue objection may be raised in the answer.[90]

A motion to quash the process is not such a general appearance as to constitute a waiver of an application thereafter filed for change of venue. By such a motion the defendant does not waive any question of jurisdiction over either the subject matter of the suit or the venue of the action.[91] Likewise a plea challenging the jurisdiction generally is not a waiver of the venue objection.[92] On the other hand, a general demurrer is equivalent to a plea to the merits and amounts to a waiver of venue.[93]

However, the circuit court may not be put in error for sustaining a venue objection filed after a general demurrer or plea to the merits unless the waiver point is raised in that court. The matter of waiver will not be considered when raised for the first time on appeal.[94]

When an objection to venue is duly raised, the point is not waived by pleading to the merits or going to trial after the venue plea is overruled, and the objection may be effectively interposed during or at the end of the trial or whenever the condition which makes the right apparent arises.[95] Thus, when the defendant on objection to the venue fails to sustain the burden, on the venue hearing, of showing improper joinder of a local co-defendant, the objection may be effectively reasserted if, on the trial, the invalidity of the joinder becomes apparent.[96]

Other phases of procedure will be discussed in connection with the subject of joinder of co-defendants for venue purposes.

E. *Validity of Joinder*

In order to forestall dismissal or change of venue on the plea on motion of one not subject to the venue of the court, a local co-defendant or a co-defendant against whom venue can be sustained must be joined in the suit.

The stated requirement contemplates that the venue-defendant be a

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[88]Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935) (permission granted); Indianola Cotton Oil Co. v. Crowley, 121 Miss. 62, 83 So. 409 (1920) (permission denied).

[89]Miss. Code Ann. § 1475.51 (1942).

[90]Brashier v. O'Connor, 181 Miss. 872, 180 So. 67 (1938) (a suit in chancery).

[91]Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931).

[92]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937), and cases cited.

[93]Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 103 (1935).

[94]Ibid.

[95]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1917).

[96]Howard v. Ware, supra note 95; Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931). The objection to venue must be specific and should be accompanied by a motion to transfer to the proper venue. The court cannot dismiss the suit (Miss. Code Ann. § 1441 (1942)) and cannot transfer it absent an objection to venue. A motion for a directed verdict is not a proper objection to venue. King v. Ainsworth, 83 So.2d 97 (Miss., 1955).

material party and that joint liability is made apparent.[97] The first requirement is that the declaration state a joint cause of action[98] and that process be served, and that as to such defendant the court acquire territorial jurisdiction.[99] If the alleged cause of action is several and not joint, the requirement is not met.[100]

The allegations of the declaration are prima facie true and there is a prima facie presumption of good faith which attaches thereto,[101] but the declaration is not conclusive.[102]

It is said that the right of the plaintiff to select the forum in a proper proceeding is a valuable right[103] and where a choice is lawfully exercised the right of election may not be denied. On the other hand, the venue rights of a defendant are equally valuable and not merely technical.[104]

The local defendant must be a material party. Moreover, he must be a proper party. It has been said that he must not be joined for the sole purpose of venue, but this statement is limited in application to those instances where, in effect, the joinder is not in good faith, as where fraud, connivance or improper device is utilized in finding the defendant in the county or liability is asserted against such defendant without cause.

In many respects the test as to a proper joinder of a local or venue-defendant seems to rest upon the good or bad faith of the assertion of a joint cause of action. If the plaintiff, in good faith, asserts a joint cause of action and follows through with an attempt, in good faith, to prove it, the joinder is not improper, for venue purposes, merely because the proof is insufficient to hold the local defendant liable as a matter of law.

Thus, when a directed verdict results as to the local defendant, the co-defendant may or may not be entitled to a change of venue, depending upon the good faith of the plaintiff at the outset, determined in the light of the developments on the trial. A directed verdict does not destroy the venue when the validity of the joinder depends upon an unsettled question of law on which there is a conflict of authority.[105] Also, where a reasonable effort is made from the factual viewpoint to prove liability,

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[97]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 So. 874 (1927); Bufkin v. Grisham, 157 Miss. 746, 128 So. 563 (1930); Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945).

[98]Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916).

[99]Cook v. Pitts, 114 Miss. 46, 74 So. 777 (1917); Estes v. Bank of Walnut Grove, 172 Miss. 499, 159 So. 104 (1935).

[100]Bergen v. Smith, 163 Miss. 797, 141 So. 760 (1937).

[101]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941); Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931).

[102]See note 101 supra; see also Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945).

[103]Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933).

[104]Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931).

[105]Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939).

venue is not lost by a directed verdict in favor of the local defendant.[106]

But when the joinder is had after a promise or agreement on behalf of the plaintiff to hold the local defendant harmless, as by a promise or agreement that he not be "hurt" as a result of the suit, the joinder is invalid and will not support venue.[107] The same result has been reached where the venue defendant is "found" by fraud or improper device.[108]

There is no indication in the authorities that venue is lost merely because the local defendant may be judgment proof or because the plaintiff intends to collect exclusively from the non-local defendant, unless the intention is manifested by promise or agreement on the part of the plaintiff, in effect, to hold the local defendant harmless. There may be other sufficient reasons for the joinder which are consistent with good faith, such as a desire to call the local defendant as an adverse witness or the fear that the theory of respondeat superior may not be maintainable in a tort action. Whatever the reason, the joinder is sufficient unless found to be in bad faith and solely for the purpose of venue.

But bad faith, in the strict sense, is not always controlling. Invalid joinder for venue purposes may extend to honest error. Thus, when it is shown clearly, as a matter of law, that the local defendant is not liable in the action [109] or when the plaintiff fails to attempt to prove liability as a matter of fact[110] the venue is lost, and this results without reference to the good faith in the strict or moral sense. Also, the fact that the trial court erroneously permits judgment to be entered jointly does not save the venue.[111]

Another requirement to effective joinder is the service of process upon the defendant on whom venue depends. On dismissal of such defendant for failure of process, venue is lost.[112] On the other hand, when a local defendant, properly joined, is served with process and the non-

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[106]Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Cox v. Dempsey, 177 Miss. 678, 171 So. 789 (1937).

[107]McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940).

[108]Nicholson v. Gulf M. & N. R. Co., 177 Miss. 844, 172 So. 306 (1937). In such cases the question is not so much a question of technical jurisdiction as it is the propriety of exercising a jurisdiction based upon fraud or improper device. The court may retain jurisdiction of the party so "found" and dismiss as to co-defendants. See also McRae v. Ashland Plantation Co., supra note 107.

[109]Long v. Patterson, 198 Miss. 554, 22 So.2d 490 (1945), citing Howard v. Ware, 192 Miss. 36, 3 So.2d 830, 140 A.L.R. 1248 (1941), and distinguishing Weems v. Lee, 185 Miss. 98, 187 So. 531 (1939); Birdsong v. Grubbs, 208 Miss. 123, 43 So.2d 878 (1950).

[110]Cf. Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Howard v. Ware, supra note 109.

[111]Cox v. Dempsey, 179 Miss. 678, 171 So. 789 (1937).

[112]Perry v. Nolan & Maris, 159 Miss. 387, 131 So. 252 (1930); Estes v. Bank of Walnut Grove, 114 Miss. 46, 74 So. 777 (1935), and cases cited; Wooley v. Brown, 41 Miss. 552 (1867).

local defendants suffer judgment by default, the plaintiff may dismiss as to the local defendant without loss of venue.[113]

F. *Procedure for Attacking Venue for Invalid Joinder*

There remains for discussion the procedure for attacking the question of venue on the issue of the validity of joinder. From a comparison of the decisions dealing with this subject, the rules may be summarized as stated below.

If the declaration states no cause of action against the local defendant or if the declaration shows on its face that he is not a material party or that his alleged liability is separate and not joint, the objection must be sustained.[114] In such cases the objection should be made promptly and in any event before the jury is impaneled, and regard should be had for the rules of waiver by pleading generally without reserving the venue objection.

If, on the other hand, the declaration is in all respects sufficient on its face, it is prima facie correct but not conclusive,[115] and the venue objection must be sustained if and when it appears that the plaintiff actually has no cause of action against the local defendant and he was improperly joined for the sole purpose of conferring venue. In such cases, the objecting defendant may attack the declaration preliminarily and by plea in abatement or motion, in which proceeding the movant has the burden of proof,[116] or he may object to the venue whenever the condition therefor arises, as where the plaintiff, having properly alleged a cause of action, rests his case without making any attempt to prove liability.

The right to object when the condition arises is not lost by having objected preliminarily and having failed to meet the burden of proof on the preliminary hearing, and the fact that the trial court erroneously enters a joint judgment will not serve to sustain the venue.[117]

Where the non-local defendant has reason to believe that the joinder is not in good faith, the better practice would be to expressly deny the pertinent allegation of the declaration and to expressly reserve

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[113]Reed v. Renaud, 14 Miss. 79 (1840). It was reasoned that the court having once acquired jurisdiction did not lose it by any subsequent change of circumstances such as appear in this case.

[114]Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281 (1916); Birdsong v. Grubbs, 208 Miss 123, 43 So.2d 878 (1950).

[115]Trolio v. Nichols, 160 Miss. 611, 133 So. 207 (1931); Long v. Patterson, 198 Miss. 552, 22 So.2d 490 (1945); Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

[116]Gasquet v. Fisher, 15 Miss. 313 (1846); Trolio v. Nichols, supra note 115; McRae v. Ashland Plantation Co., 187 Miss. 350, 192 So. 847 (1940); Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A. L. R. 469 (1943); Howard v. Ware, supra note 115.

[117]Howard v. Ware, 192 Miss. 36, 3 So.2d 830 (1941).

all objections to venue. Under our recent pleading statute[118] this may be included in the answer, and it will serve to exclude any contention that the point was waived.[119]

It is noted that while the objection to venue may be asserted when the condition therefor arises and while this is a valuable right, it is still a personal privilege and not fundamentally jurisdictional. Therefore, objection should be made at the first opportunity, which is the time when the objecting defendant is apprised of the conditions on which venue may be attacked. Here diligence is required to forestall the finding of waiver. If the plaintiff, because of his bad faith, is not entitled to consideration in this respect, the public has an interest in the avoidance of the expense of abortive trials.[120]

G. *Household and Residence — Defined*

In order that an individual shall have the right of removal, he must be a citizen of this state and a resident of the state, and so it has been held that a traveling salesman who has no established home or fixed place of residence has no right of removal to a place where he frequently stays.[121]

The statute uses the terms "household and residence." Persons who dwell together as a family constitute a "household," and a householder is one who has a family whom he keeps together and provides for and of which he is the head and master.[122] Residence is the equivalent of "domicile" and is synonymous therewith. A domicile is a "legal residence."[123] In applying the venue statute, however, the phrase "household and residence" has been considered in the sense of a legal residence or domicile, and the technical definition of a "household" has been disregarded.[124]

What then is a legal domicile or residence? It is said that one resides where he has a settled abode for a time, for business or other pur-

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118Miss. Code Ann. § 1475.5 (1942).

119Technically, the issue may be raised preliminarily by plea or by motion or by both. Long v. Patterson, supra note 115. But by inclusion of the plea in the answer, followed by a motion for preliminary hearing, the defendant will preserve the point and at the same time give the trial court the option of hearing the matter preliminarily or of remanding the issue for determination on the trial, thus avoiding possible abuse of the procedure and trial of factual issues in piecemeal. Cf. Forman v. Miss. Publisher's Corp., 195 Miss. 90, 14 So.2d 344, 148 A.L.R. 469 (1943).

120Long v. Patterson, supra note 119, wherein the court recognized the rule that venue may be changed whenever the condition therefor arises, but commented that "this is particularly true when the conditions have been clearly disclosed in limine as here." Cf. Forman v. Miss. Publisher's Corp, supra note 119, for warning as to possible abuse of the procedure where it is sought to thresh out the merits of a plaintiff's case by piecemeal.

121Knower v. Baldwin, 195 Miss. 166, 15 So.2d 47 (1943).

122Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931).

123Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

124See, e.g., Indianola Cotton Oil Co., v. Crowley, 121 Miss. 262, 83 So. 409 (1920).

poses, although he may intend at some future time to move to another place.[125] However, temporary residence in one county for business purposes may be consistant with a legal domicile elsewhere.[126]

A domicile once established is presumed to continue and the burden of proving the contrary is upon the party alleging it. To show a change and rebut the presumption, it must be demonstrated that the apparent change was not only voluntary but that it was the intent of the person to remain at the new abode without intention of returning to the former domicile, and mere lapse of time does not alone constitute an abandonment within the rule.[127]

VII. LITIGANTS EXCLUDED

Governmental agencies in corporate form which are subject to suit are not specifically mentioned in venue statutes, but by reference to the common law, it has been held that a municipal corporation may be sued only in the county where it is located and that jurisdiction may not be maintained elsewhere by joinder of local defendants or defendants jointly liable and subject to suit in some other county.[128]

VIII. LOCAL ACTIONS

The discussion heretofore has been related to personal or transitory actions. Local actions fall in a different category. These, according to the venue statute, consist of actions of trespass on land, of ejectment, and for the wrongful cutting of trees. Such actions "shall" be brought in the county where the land, or some part thereof, is situated, except that if the land lies in two or more counties and the defendant resides in either, the action "shall" be brought in the county of his residence.[129]

This provision is mandatory and involves the court's jurisdiction over the subject matter. Where such jurisdiction is absent it cannot be waived or conferred by consent of the parties.[130] These are the only ordinary actions which can be brought in a county where the defendant is not found physically or by reason of statutory provisions.[131] In rem actions are also excluded.[132]

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[125]Buckley v. Porter, 160 Miss. 98, 133 So. 215 (1931); Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[126]Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938).

[127]Ibid.

[128]Jackson v. Wallace, 189 Miss. 252, 196 So. 223 (1940); see also State ex rel. Cowan v. State Highway Comm., 195 Miss. 657, 13 So.2d 614 (1943), dealing with a suit against a state corporation.

[129]Kraus v. Stewart, 122 Miss. 503, 84 So. 463 (1920); Jefferson Davis County v. Riley, 158 Miss. 473, 129 So. 324, aff'd, 130 So. 283; Cf. Bassett v. Stringer, 216 Miss 766, 63 So.2d 234 (1953).

[130]Wilkinson v. Jenkins, 77 Miss. 603, 27 So. 611 (1900).

[131]Elder v. Hilzheim, 35 Miss. 231 (1858); Archibald v. Miss. U. T. R. Co., 66 Miss. 424, 6 So. 238 (1889).

[132]Eaton v. Hattiesburg Auto Sales Co., 151 Miss. 211, 117 So. 534 (1928).

IX. RELATED VENUE STATUTES

Special statutes apply to various litigants and from these it is to be determined where such litigants may be found for venue purposes.

For example, railroad, express, steamboat, power, telegraph, telephone and transportation corporations and their operators may be found for venue purposes in any county in which the line or route may be.[133]

Insurance companies may be found in any county in which the loss may occur and life insurance companies may be found wherever the beneficiary resides. They may also be found in the county of the corporate domicile.[134]

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[133]Miss Code Ann. § 1434 (1942).
[134]Miss. Code Ann. § 1435 (1942).

LEGAL PROBLEMS THAT MAY BE ENCOUNTERED IN THE ADMINISTRATION OF MISSISSIPPI'S BAWI PROGRAM

*Aubrey H. Bell**

"Sweet are the uses of adversity;
Which, like the toad, ugly and venomous,
Wears yet a precious jewel in its head."

As You Like It

HISTORICAL SKETCH

Mississippi's first Balance Agriculture with Industry Act was conceived during the depression, born in 1936 a child of adversity and lived its life expectancy of less than four years to be succeeded by a more stalwart member of the legislative family. September 19, 1936, is the official birthday of Senate Bill Number 1 of the First Extraordinary Session of the Mississippi Legislature of 1936. This creature of the legislature had new features and its legitimacy had to be adjudicated before it was finally accepted in the household of laws.

At this extraordinary session of the legislature it was solemnly resolved that:

> "Whereas there exists an acute economic emergency for which the requisite remedy is the balancing of agriculture with industry as herein done, said emergency having decreased Mississippi's industrial enterprises so that many of her citizens are on relief and are leaving the state," and
>
> "Whereas the purchasing power of her citizens has been seriously impaired," and
>
> "Whereas the sole remedy of saving agriculture in Mississippi is to develop industry . . . ."[1]

These were solemn pronouncements of the legislature of a sovereign state and the legal conclusions of the premises stated were to be tested by law and not logic.

Thus Mississippi gave not only to its citizens but so far as we know to the nation at large its first act attempting to balance agriculture with industry by the use of public funds.

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[1]Preamble, Senate Bill Number 1, First Extraordinary Session Legislature of Mississippi of 1936.

No sooner had the ink dried with which the governor had signed his name to this act than was its validity challenged under the federal and state constitutions. Lack of "due process of law" under the 14th amendment to the Constitution of the United States and of Section 14 of the Constitution of Mississippi was asserted to establish its invalidity, as were sections 17, 183 and 258 of the state constitution. The legal ammunition afforded by these respected sections of the federal and state constitutions was forcibly hurled to destroy this new legal creature. The battle was fought in the Chancery Court of Montgomery County, Mississippi, when W. S. Albritton filed objections to the validation of bonds proposed to be issued by the City of Winona to establish an industry under Chapter 1 of the First Extraordinary Session of the Mississippi Legislature of 1936. From a decree validating the bonds he appealed to the Supreme Court of Mississippi.[2]

The Supreme Court rendered its opinion upholding the constitutionality of this act but not without respectable dissent. The majority opinion in making legitimate this child of the legislature declared:

> "The purpose for which the state exists is to promote the welfare of its citizens—their peace, happiness and prosperity."

Also:

> "The government is the state's agent, created by its Constitution and charged thereby with the duty of accomplishing this purpose, which duty rests with equal force on each of the departments into which the government is separated—the executive, the legislative and the judicial."

It more fully adjudicated that the act "seeks to promote the public welfare" by providing opportunity for laboring men to obtain employment and agricultural products to obtain outlets and that "thousands of our citizens throughout the state who are dependent on manual labor for a livelihood were without employment."[3]

Judge Anderson recorded his dissent which concluded with these words:

> "So it appears plain to me that this scheme is absolutely cut off by our Constitution. This is not a case of stretching the Constitution to meet any condition, but is a case of breaking it."[4]

The growth of this scion of the legislature was rapid, in that towns and counties within the state began seeking industries willing to accept the generous offer of public funds. In due time economic recovery became apparent throughout the state and the nation and the conditions

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[2]Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A. L. R. 1436 (1938).
[3]Ibid.
[4]Id. at 121, 178 So. at 814.

that gave birth to the legislative act in 1936 were gradually, but fortunately, disappearing. It became necessary, therefore, for this child to change his legal garments and the legislature promptly fashioned new clothes to adorn his body. In 1940 the legislature passed Chapter 133 which amended Sections 2, 8, 9, 11 and 12 of Chapter 1 of the Laws of the First Extraordinary Session of 1936, extending the time within which the authority may be exercised to June 1, 1940—a brief two months of additional life.

The effect of this was to renew the pronouncements in respect to economic conditions and unemployment recited earlier in 1936.

This same legislature enacted another law by which adjacent supervisors' districts in separate counties may obtain the benefits of the industrial plan authorized in 1936.[5] This permitted a larger contiguous geographical area to combine for the purpose of furnishing public funds to finance manufacturing plants.

As an auxiliary aid to the balancing of agriculture with industry the legislature in 1936 passed an act creating the State Planning Commission and prescribed its powers and duties.[6] During the regular 1940 session of the legislature this act was repealed and superseded by a statute creating the Mississippi Board of Development and abolishing the Mississippi Industrial Commission and the State Planning Commission, transferring their functions to the new Board of Development.[7]

This same act repealed Chapter 1 of the Laws of the First Extraordinary Session of 1936 and Chapter 18 of the Second Extraordinary Session of 1936, the latter being an amendment to Section 19 of Chapter 1 of the First Extraordinory Session of 1936 pertaining especially to exemption from ad valorem taxation. Chapter 146 of the Laws of Mississippi of 1940, although approved April 26, 1940, did not become effective until June 30, 1940, thirty days after the termination of the economic urgency determined by the legislature in 1936. Thus from June 30, 1940, until March 30, 1944, the Board of Development of the State of Mississippi seems to have had the responsibility of the industrial development of the state. The legislature during its regular 1944 session again recognized the necessity for the State of Mississippi to protect its people by balancing agriculture with industry and authorized the issuance of bonds or other obligations to acquire industrial enterprises.[8]

In 1946 the legislature passed two acts extending the authority granted governmental units under Chapter 241 of the Laws of Mississippi of 1944 so as to authorize supervisors' districts of adjoining counties

[5]Miss. Laws 1940, c. 292.
[6]Miss. Laws 1936, c. 189.
[7]Miss. Laws 1940, c. 147.
[8]Miss. Code Ann. §§ 8936-01 to 41 (1942).

to cooperate and join in acquiring industrial enterprises[9] and likewise to authorize adjoining municipalities to do the same.[10]

In 1950 this authority was extended to municipalities located in adjacent counties which are a part of a municipal separate school district located in adjacent counties to cooperate for the purposes of acquiring industrial enterprises.[11] Thus municipalities, supervisors' districts and counties may operate independently or jointly and may combine to exercise the benefits afforded by the existing statutes in promoting the establishment of industries within their limits. So powerful has been this legal and financial combination that it has aroused the opposition of industrial communities in the North and East to provoke sectional competition and to hinder the negotiation of bonds issued for this purpose by proposing legislation to tax the income therefrom and to discredit them in the hands of investment bankers.

Will Mississippi's Balance Agriculture with Industry Act continue to expand free of legal problems? The answer to this question must necessarily be "no" and we shall attempt to suggest some of the problems that may confront the administration of this act.

CONSTITUTIONALITY OF THE ACTS

Will the reasons set forth in the majority opinion of the Supreme Court in *Albritton v. City of Winona* sustain the constitutionality of Chapter 241 of the Laws of Mississippi of 1944 and subsequent acts? At least the legislature thought so when it declared the health, safety and even morals of the citizens of Mississippi depended upon the development within the state of commercial, industrial, agricultural and manufacturing enterprises.

> "The Legislative Department is primarily charged with the duty of determining by what means this purpose can be accomplished. To that end it is invested, by Section 33 of our State Constitution, with all legislative power, except so far as other Sections of the Constitution place a limitation thereon."[12]

The 1944 statute did not contain the dreary picture of a depressed citizenry suffering from economic disorder as was set forth in the preamble of Chapter 1 of the First Extraordinary Session of the Legislature of 1936. It did declare, however:

> "That a balanced economic development of this state is essential.
> "That reconversion from war-time economy to peace-time pursuits appears reasonably imminent.

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[9]Miss. Code Ann. §§ 8938-01 to -08 (1942).
[10]Miss. Code Ann. § 8937 (1942).
[11]Miss. Code Ann. § 8936-31 (1942).
[12]Albritton v. City of Winona, 181 Miss. 75 at 95, 178 So. 799 at 803 (1938).

> "That the present and prospective health, safety, morals, pursuit of happiness, right to gainful employment and the general welfare of the citizens demand as a public purpose, the development within Mississippi of commercial, industrial, agricultural and manufacturing enterprises . . . ."[13]

Thus the legislature by a solemn declaration that became the law affirmed that the well-being of its citizens including their morals depended upon the development within the state of commercial and industrial enterprises. This apparently was to bulwark the act against an attack based on a violation of the due process of law sections of the state and federal constitutions and to come within all of the sanctions of constitutionality recited in the *Albritton v. City of Winona* case.

It is impressive to observe that the legislature did not risk the constitutionality of either the 1936 or the 1944 acts without declaring the existence of some abnormal economic situations. This basic condition in the 1936 act was an acute economic emergency resulting from the general depression and in the 1944 act it was a reconversion from war-time to peace-time pursuits.

The legislature set a limit on the life of the 1936 act because recovery from the economic depression became apparent. When that act expired the legislature did not immediately announce the existence of any economic emergency and waited until 1944 to take notice of the conversion of war-time activities to peace-time pursuits. Could it have been the thought of the legislature that these acts could not be sustained without the actual presence of some abnormal conditions? Will there come a time when the Supreme Court of Mississippi will take judicial notice that war-time activities have been converted into peace-time pursuits? Whether such an adjudication would materially affect the constitutionality of the 1944 act is a question that cannot be answered without an actual decision of the Court.

The construction of the 1944 act came before the supreme court in 1952 on the question of the validity of an election held in three supervisors' districts of Pearl River County and its constitutionality in other respects was not presented and was apparently conceded.

Taxation to pay the bonds and interest issued under any act must always be for a public purpose or the due process of law sections of the federal and state constitutions will be violated.

> "The due process of law contains no specific limits upon the right of taxation in the states, but it has come to be settled that the

[13]Miss. Code Ann. § 8936-05 (a) - (c) (1942).

authority of the states to tax does not include the right to impose taxes for merely private purposes."[14]

In the *Greene* case the Supreme Court of the United States had before it the constitution and laws prevailing in North Dakota and a decision of the highest court of that state, all declaring the purpose for which the acts were passed to be of a public nature; and thus they were upheld.

An amendment to the Constitution of the State of Louisiana was construed by the supreme court of that state as being valid.[15] This amendment authorized a parish, ward or municipality to encourage the location of industrial enterprises by the issuance of bonds for the purpose of acquiring industrial plant sites, construct buildings thereon and to acquire other necessary property to put the same in operation.[16]

In both the North Dakota and Louisiana cases there was a *constitutional amendment* contrasted with only a *statute* in our state.

More like our own statute is an act of Kentucky which authorized a municipality to create a bonded indebtedness to erect industrial buildings and to attract new industries to reduce abnormal unemployment.[17] The constitutionality of that act was upheld by the Court of Appeals of Kentucky on the theory that the debt was created for "a public purpose."[18] The case construing this statute cited *Albritton v. City of Winona* and also *Carmichael v. Southern Coal & Coke Co.*[19] and quoted the following from the latter opinion:

> "The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increases in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children."

It is interesting to note, however, that the Court of Appeals of Kentucky held that a city seeking to create such a bonded indebtedness must establish by clear and convincing proof the existence of the under-

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[14]Greene v. Frazier, 253 U. S. 233 (1920).
[15]Miller v. Police Jury of Washington Parish, 226 La. 8, 74 So.2d 394 (1954).
[16]La. Const. art. 14, § 14 (b.2).
[17]Ky. Rev. Stat. §§ 58.010, 66.070.
[18]Dyche v. City of London, 288 S.W. 2d 648 (Ky. 1956).
[19]301 U. S. 495 (1937).

lying economic conditions rendering the project essentially one of "a public nature."

If it should ever become controversial whether the conditions proclaimed in Chapter 241 of the Laws of 1944 still exist, then the governmental unit seeking the issuance of bonds might be forced to prove that they still prevailed in order to come within the provisions of the statute.

The dominant purpose will always have to be a public one and the legislature seems to have taken care of it very well so far.

Considering the North Dakota and Louisiana cases with the Kentucky and Mississippi decisions, could it be said that Mississippi could strengthen its present position by a constitutional amendment? This would certainly give a firmer foundation to the validity of the BAWI plan than now exists by statutes that may outlive the circumstances which they were designed to alleviate. In the *Greene* case, the Supreme Court of the United States made mention of the fact that the authority given by the Constitution of the State of North Dakota was significant.

The construction of the words "public purpose" and "public credit" is most important. If the aid given is construed to be public credit, then the act must fail under our constitution. If, however, it is not one of extending public credit but merely the financing for a "public purpose," then the act may gain judicial sanction.

In a recent case from New Mexico a statute authorizing municipal financing of industrial building through the proceeds of municipal revenue bonds was held invalid because it was contrary to the constitutional provisions forbidding the lending of public credit in aid of private enterprises.[20]

The town of North Miami, Florida, without statutory authority attempted to issue securities to raise money to purchase land, erect an industrial building thereon and thereafter to lease the same to a private corporation with the rental revenues pledged to pay the securities. The Supreme Court of Florida condemned the proceedings as being the use of public funds for private purpose.[21]

Both the 1936 and the 1944 statutes affirm that the alleviation of unemployment with its consequential evil results establishes a "public purpose." While this reasoning has been sustained by some states, it has been rejected by the Tennessee court.[22] In another case from that state it was held that the primary benefits are received by the private industry and that the community obtained only incidental gain.[23]

The Supreme Court of Mississippi condemned a statute that was

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[20]Village of Deming v. Hosdeeg, 62 N. M. 18, 303 P.2d 920 (1956).
[21]State v. Town of North Miami, 59 So.2d 779 (Fla. 1952).
[22]Azbill v. Lexington Mfg. Co., 188 Tenn. 477, 221 S.W. 2d 522 (1949).
[23]Ferrell v. Doak, 152 Tenn. 88, 275 S.W. 29 (1925).

not designed primarily to relieve unemployment and promote the agricultural and industrial welfare of the state as not being for a public purpose.[24]

Shall the citizens of Mississippi, therefore, be content to rely on statutes only and thereby risk the further industrial development of the state when economic conditions may be said to be steadily improving, or will they rest their case on the words of John Marshall, Chief Justice of the Supreme Court of the United States, when he said that a constitution is

> ". . . intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as the occur,"[25]

or on the words of Justice Alexander of the Supreme Court of Mississippi written many years later:

> "The narrow shackles imposed by a short sighted construction of constitutional limitation have been progressively relaxed so as to give play to impulses which rise above mere beneficence and attain the recognition and dignity of a public duty and purpose. If occasion demands these provisions should to this end be given a liberal construction."[26]

PROCEDURE IN APPLYING THE ACT

Chapter 241 of the Laws of Mississippi of 1944, as amended, creates what is known as the "Mississippi Agricultural and Industrial Board," which is composed of certain designated state officials and citizens from the state at large. This board now consists of fifty-six members, exclusive of the executive director who is appointed by the governor. This board has the duty of preparing and perfecting plans for the advertisement and development of the state in such manner and through such means as it may determine to be proper, and to administer and make effective the declared public policy of the state as set forth in the act.

The first step in acquiring an industry, however, must be taken by the municipality, county or district where the same is to be located. Such governmental unit has the right to apply to the A. and I. Board for a

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[24]Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934).
[25]McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316 (1819).
[26]City of Vicksburg v. Crichlow, 196 Miss. 259, 16 So.2d 749 (1943).

certificate of public convenience and necessity reciting that the general welfare requires that such unit enter into a particular program. The board is given wide latitude in determining whether a certificate shall be issued and may hold public hearings, make private investigations, summons witnesses, hear testimony and make record of all things done at such hearing or investigations. In arriving at its determination whether or not such certificate shall issue, the board *must* find and determine affirmatively the following:

1. That there are sufficient natural resources readily and economically available for the operation of the particular enterprise for at least ten years or during the maturity of the bonds that will be issued.
2. That ample labor supply is available within an area of twenty-five miles from the proposed location, and
3. That there are adequate property values and suitable financial conditions so that the total bonded indebtedness of the governmestal unit involved, issued solely for the purpose authorized by the act, shall not exceed twenty per centum of the total assessed property of the said governmental unit.[27]

While the board is making the above determination it must exercise "due regard to the promotion of the public policy and the general welfare herein declared," the act does not specifically require the board to make any finding as to reconversion from war-time to peace-time pursuits, nor to consider the employment problems from such change in conditions. If the conversion from war-time to peace-time pursuits is essential to the conditions supporting the act of 1944, should it not affirmatively appear in the record of the inquiry made by the Board?

Since the A. and I. Board is not a court of record, all of the jurisdictional requirements must appear in its minutes or in the record produced by it.

Frequently the application filed by a municipality is done when enthusiasm is at a high pitch and the sponsor makes urgent appeal to the director to have the board or the executive committee created by the statute pass on the application and issue the certificate of convenience and necessity without giving time for adequate inquiry. In view of the Kentucky case holding that the burden of proof on a contest rests on a municipality, it would appear that much depends upon the inquiries made by the board before the certificate is issued. It may be beneficial for the board to adopt as its rule and regulation, if it has not already done so, that no certificate be issued until after a given number of days from the filing of the application.

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[27]Miss. Code Ann. § 8936-08 (1942).

Section 9 of the 1944 act sets forth the three necessary adjudications that the board must make. These deal primarily with private and not public purposes. The board should take care to go further and in all cases include in its findings that the proper economic development and employment is necessary to the general welfare of the community. The board has the power to visit the municipality or to have representatives appear at its meetings and make sufficient inquiry into all matters that establish the project as designed for a "public purpose."

If the certificate is granted, the next step is for the municipality and the specific company involved to enter into a contract under which the industry will be established. The importance of this contract cannot be stressed too strongly. Among other things, it should provide that the parent company and not a Mississippi corporation, to be formed to operate the plant, be the responsible party. The contract may include a lease agreement with rentals equal to the amount of bonds sold and delivered plus all interest maturing and plus all handling charges. The latter expense may be considerable over a period of time during which the bonds mature.

The contract between the municipality and the corporation should contain a provision in respect to the use of any surplus bond money remaining after the completion of the purpose for which bonds were issued. The amount of bonds to be issued, including all costs incident thereto, should be determined with as much accuracy as possible so that no sizeable surplus will remain. Section 13 of Chapter 241 of the Laws of Mississippi of 1941 provides that the proceeds of the bonds shall be placed in the municipal treasury as a surplus fund and shall be used for no other purpose than the purpose set forth in the original resolution. Section 14 of the same chapter provides that any surplus funds may in the discretion of the board of the municipality be invested by purchasing certain designated county, municipal, state or United States Government bonds. Section 16, however, contains a provision that the municipality may use any surplus funds to purchase any bonds issued under the authority of the act and to cancel and retire the same. The contract between the municipality and the corporation should contain a provision that in the event the municipality did purchase and cancel bonds so issued the corporation would not be relieved of paying rent during the year in which the bonds are cancelled.

Contracts under BAWI statutes generally provide that the corporation pay an annual rent equal to the maturing bonds and interest. If bonds are purchased and cancelled from surplus funds, the corporation should not be relieved of its obligation to pay an annual rental. This rental should then be placed in the sinking or surplus fund and invested

as authorized by Section 14 of the Act. This method would provide a fund which could be used in the event the corporation became financially unable to pay its rent. In drafting contracts between municipalities and corporations, care should be exercised to include a provision on how surplus funds will be used in conformity with the BAWI Act.

The contract will usually provide that the company agrees to maintain an average annual payroll of specified dollars but the failure to do so should not terminate the contract.

Title to the property should, of course, be taken in the name of the municipality or other governmental unit and the A. and I. Board must approve the site. An interesting question presents itself: In case of cities, towns or villages, where may the site be located? The 1944 act uses the term "municipalities" to include counties, supervisors' districts, as well as cities, towns or villages, in giving the power of eminent domain to "municipalities" to acquire property for industrial purposes. The act should specifically state that municipalities may acquire land outside of their limits as a site for manufacturing plants even though no other part of the county be involved in the bond issue.

The provision of the statute authorizing the A. and I. Board to approve the site may carry with it the authority for a city to acquire lands outside of its limits for industrial purposes. It may also be true that the general statute providing that governmental authorities of municipalities may exercise the right of eminent domain without, as well as within its corporate limits in specified cases and "in any other case where the land is to be used for public purposes" may provide such authority.[28]

The total amount of bonds to be issued, the maturity dates of the bonds, the amount of taxes necessary to be levied and collected annually to retire the bonds and to pay the interest thereon are all determined by the board and not by the governing authorities of the municipality, county or district issuing the same. This is a decided variation from the general powers granted municipal authorities. While in active practice we may assume that the A. and I. Board and the municipal authorities will be in harmony on these subjects, it is not so required by the statute. The municipal authorities in all cases at least should have the statutory power to suggest the amount of bonds, their maturity and the tax rate to be levied and to submit the same to the board for approval. There are many reasons why this should be done because of previous outstanding bonds and the relation to established maturities. We do not mean by this comment to infer that the Agricultural and Industrial Board

[28]Miss. Code Ann. § 8936-20 (1942).

acts arbitrarily in performing this duty but make this observation because we are concerned only with the statutory provisions.

If there should be a default in the payment of rent, then it would be exceedingly important that bond maturities be so arranged that considering other existing bonds the burden will not be too great on the taxpayers.

In acquiring a site for a manufacturing plant by a municipality, the owner may desire to reserve the oil, gas and mineral rights and the question may arise as to the right of the city to purchase land with mineral reservation in favor of the seller. Unless there be a statute to the contrary, it would appear that a municipality would have a right to purchase the land without the oil. gas and mineral rights provided a prior adjudication was made by the governing authority and that such rights were not needed for a "public purpose." This decision would be conclusive unless brought about by fraud or abuse of discretion.[29] Certainly this would be true in case of eminent domain proceedings where such rights were not to be condemned. We realize, of course, that other complications may come about in having one person own the minerals with the right to explore for the same on property otherwise devoted to a public use. Many legal complications could come about by such separate ownership and in oil conscious Mississippi it would be well for the entire fee in the property to be owned by the governmental unit.

In this connection it must be observed that Section 12 of Chapter 241 of the Laws of Mississippi of 1944 gives municipalities (which includes counties, supervisors' districts, cities, towns and villages) the right to "acquire land." This might be construed to mean a fee simple title and if such would be the case complications would result where mineral reservations were made.

The third step is for the municipality to call for an election to determine whether the industrial plan shall be developed and whether bonds shall be issued for such purpose. The statute is very plain on the procedure for the issuance of bonds and little difficulty, if any, should be experienced in following the statutory directions.

In *Burge v. Board of Supervisors*,[30] the Mississippi Supreme Court construed Chapter 241 of the Laws of Mississippi of 1944 and Chapters 245 and 320 of the Laws of 1946 and Chapter 520 of the Laws of 1950 in respect to the method of computing majorities required to approve the bond issue in cases where two or more governmental units are involved. Care should be taken to give all the notices required by the

[29]City of Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929).
[30]213 Miss. 752, 57 So. 2d 718 (1952).

statute and proper adjudications should be made by the municipal governing authority that the same were given before the bonds can be issued. After the election is held a report is made by the Election Commissioners and if the necessary majorities were recorded the bonds will be issued. The governmental authority of the municipality then passes a resolution adjudicating all of the proper steps for the calling, holding, and reporting of the results of the election and the same are issued in accordance with the amount and maturities previously approved by the A. and I. Board. The bonds are then sold after the notice of the sale has been published for the time required by law. It is frequently the custom to have the bidders offer a designated price for the bonds bearing a specified rate of interest. The best bidder for the bonds is usually the one who offers the lowest interest cost over the life of the bonds. The resolution actually issuing the bonds is sometimes delayed until after the bonds have been sold so that the interest rate may be stated in the resolution directing the issuance of the bonds. If the bonds are first issued and then sold, it will be necessary to amend the resolution so that the interest rate may be included therein. The bonds are then validated and an opportunity presented for any qualified person to file objections to the same. If any protest or objections are filed, then a hearing will be had as in other cases. If there be none, then a decree is rendered approving the bonds and no defense to the same may thereafter be imposed.

The industry is then a legal reality.

OWNERSHIP, LEASE AND SALE OF PROPERTY

Statutory authority is given to such municipalities "when and to the extent authorized by said Board"[31] to sell, lease or otherwise dispose of such enterprise in the same manner that any private corporation, association, or person may do with reference to property of a similar nature. The property is leased to the company under contract to operate the same and rents will be paid annually in an amount sufficient to retire the bonds and interest. In some cases the contract between the municipality and the company may contain an option in favor of the company to purchase the property at a nominal sum if and when the bonds and interest have all been paid. A serious situation may develop where the company has the right to acquire the property at a price less than its actual market value. Much may depend upon whether the lease with option is construed to be a contract of sale or strictly a lease. If it is a contract of sale, that would mean that the payments were capital investments and not rent.

[31]Miss. Laws 1944, c. 241, § 19.

The 1944 act gives municipalities practically unlimited authority to deal with the subject property. This would appear to take the case out of the general law regulating the use of property by municipalities and counties. In respect to cities, towns and villages the general rule is that such governmental unit has no power to rent or sell to private persons municipal property which it holds for a public use.[32] The effect of the decree in the *Albritton* case was to adjudicate (1) that the property acquired was for a "public use" and (2) that in spite of this and contrary to the general authority the statute authorizing the lease or conveyance of the property to a private corporation was valid since it was the *property* and not a *public use* that was conveyed. This is indeed an interesting distinction, yet a valid one.[33] The court thus holds that the public use is retained and the property only alienated. If under such authority the lessee should attempt to divert the property to a use which would not be construed a "public use," then the courts would be open to prevent or redress a wrong.[34] The contract before the court in the *Albritton* case contained a lease. It is obvious that a lessor has claim on the property and may under certain circumstances declare a breach and repossess it, thus preserving its right to insist upon a public use of the property. Different situations, however, may prevail in case of a sale. It does not appear that the *Albritton* case could be used as authority for sale of such property unless it be first adjudicated that the public use had terminated, the 1944 statute to the contrary. Section 183 of the Constitution of Mississippi must first be satisfied. We get the impression that the municipality *must* retain the public use and under the section of the constitution just referred to cannot convey property dedicated to or used as a public use. A deed without limitation or restriction could violate that section.

The City of Biloxi owned a lot which was paid for from funds of the Biloxi Municipal Separate School District. It subsequently executed a deed to this property to Harrison County for a consideration of one dollar and an agreement by the county to erect, operate and maintain on the property a modern health clinic. In passing upon this transfer of title the Supreme Court of Mississippi said: "The transfer of this property by the city cannot be viewed otherwise than a donation. Regardless of its evident altruistic purpose and commendable resourcefulness, the city was without power to make such donation."[35] In an-

[32]3 McQuillin, Municipal Corporations § 1243 (2d ed. 1943); Marshall v. City of Meridian, 103 Miss. 206, 60 So. 135 (1912).

[33]5 McQuillin, Municipal Corporations § 2329 (2d ed. 1943); Taylor v. Comm'r. of Ross County, 23 Ohio St. 22 (1872); Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A. L. R. 1436 (1938).

[34]Taylor v. Comm'r of Ross County, 23 Ohio St. 22 (1872).

[35]Miss. Const. art. 7, § 183; Swetman v. Harrison County, 207 Miss. 831, 42 So.2d 801 (1949); Brister v. Leflore County, 156 Miss. 240, 125 So. 816 (1930).

other case statutory authority permitted a municipality to contribute a site to three supervisors' districts in the county to be used as a site for a county hospital.[36] This conveyance was held valid under the statute then before the court which specifically authorized a city, supervisor's district or a county separately or jointly to acquire land for hospital purposes. This would not seem to be adequate authority for a municipality to convey valuable property to a lessee after the fulfillment of his lease contract by the payment of rents, nor does it appear that Chapter 241 of the Laws of Mississippi of 1944 authorizes a conveyance for an inadequate consideration. If it is the intention of the legislature that rent payments be considered capital investments, then it should plainly be stated in the statutes.

Tax problems are also presented. Since 1936 rentals paid under BAWI contracts for leased property have been charged off as a direct operating expense when computing federal income tax. No objections to this procedure by the United States Internal Revenue Department were made until 1956. In August of that year the Revenue Department challenged the rights of a lessee under a lease contract to deduct such rents.[37] The company involved had a primary lease for a period of twenty years with an option to renew the lease but *not to purchase.* If a decision has been made we are not aware of it. The issue involved affects a great number of manufacturers holding BAWI contracts and strong opposition to the position taken by the Internal Revenue Department may be anticipated.

BONDS

The 1936 and the 1944 statutes authorized the issuance of "general obligation" bonds payable from the taxes and general funds of the municipality. Other states that have followed Mississippi's lead in passing laws to reduce unemployment and balance agriculture with industry have in most cases authorized the issuance of self-liquidating revenue bonds which are payable solely from the rents received from the company operating the enterprise.[38] Louisiana is the only exception to the latter group. Those states issuing revenue bonds thus avoid creating an obligation that is paid from taxation or the general fund upon default of the lessee in the payments of rents. The class of bonds could have a great bearing on the constitutionality of the law under the due process clause of the Federal Constitution. The Mississippi statutes successfully met this challenge in the *Albritton* case. The Louisiana

[36]City of Indianola v. Sunflower County, 209 Miss. 116, 46 So.2d 81 (1950).

[37]Gem Company, Inc., Byhalia, Mississippi, at conference held at Oxford, Mississippi, on September 12, 1956, with representatives of the Internal Revenue Service.

[38]Alabama, Illinois, Kentucky, New Mexico and Tennessee.

statute permitting the issuance of general obligation bonds was not attacked as a violation of the due process clause of the constitution of that state because it was based on a constitutional amendment. The soundness of the doctrine established by the Mississippi courts has been questioned.[39] As has already been pointed out, the Mississippi statute authorizing the use of general obligation bonds was upheld on account of abnormal social and economic conditions prevailing at the time of the passage of the act. The amendment to the Constitution of Louisiana was likewise passed at a time when a certain group of farmers were in distress.

In discussing this method of avoiding condemnation under the due process clause it has been stated:

> "The mere inclusion in a statute of its express purpose should not be a decisive factor in distinguishing the Mississippi case nor should the arbitrary distinction between primary and incidental purposes be adequate in the Louisiana case."[40]

Whatever type of bonds used they have been subject to attacks by lawmakers and bankers. Various bills have been introduced in Congress to remove tax exemption from income derived from municipal bonds issued for industrial purposes. Attempts also have been made to disollow deductions to private businesses for rental payments made to state or local government units for the use of property acquired by governmental units by the issuance of industrial development revenue bonds. A brief history of the effort may be outlined as follows:

In the 83rd Congress five bills were introduced, one of which was H. R. 2734.[41] This bill applied to revenue bonds only. The others are identified as H. R. 4127, H. R. 6123, H. R. 7188 and H. R. 8300, which is the Internal Revenue Code of 1954. None of these acts, seeking to remove the tax exemption on such bonds, were passed. In the case of H. R. 8300 a provision was added to the code disallowing deductions to private businesses for rental payments made to state or local governmental units for the use of property acquired by the issuance of industrial development revenue bonds after January 21, 1954. This provision passed the House but it was deleted by the committee when it reached the Senate.

Three attempts were made in the 84th Congress and one so far

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39 12 Tul. L. Rev. 645 (1938).

40 40 Minn. L. Rev. 681 (1956).

41 This bill provided that "interest upon an obligation issued by a state or territory, or any political subdivision thereof, or by the District of Columbia, shall not be exempted if (i) such obligation is issued in connection with the acquision, construction, equipment or other development of property which is to be operated by one or more non-public enterprises, and (ii) such obligation is not secured by general credit of the governmental unit issuing it."

in the 85th Congress, this is H. R. 801 and was referred to the Committee on Ways and Means. No action as yet has been taken.[42]

The Investment Bankers Association of America at a meeting held in Hollywood, Florida, in 1951 adopted a resolution cautioning the members about the sale of industrial bonds to their customers, suggesting that it was unsound practice for public funds to be used to promote private enterprise. The Municipal Finance Officers Association of the United States and Canada subsequently adopted a similar resolution. In September, 1952, the Section of Municipal Law of the American Bar Association at the San Francisco meeting passed a resolution to the same effect.[43]

It appears that these highly reputed associations have indicated at least a concern about the growing tendency of governmental units to issue general obligation or revenue bonds to finance the erection and equipping of industrial plants.

Great care should be exercised in estimating the amount of bonds necessary to complete the project. The primary obligation to state the amount of bonds to be issued is vested in the Agricultural and Industrial Board.[44] When the amount is decided upon, an election is called and if the results are favorable the bonds may be sold within three years after the date of the election. Frequently only part of the authorized bonds are sold so that there will be little, if any, surplus remaining. Legal complications may result if a large sum remains in the bond fund after the purpose has been fulfilled. This excess may be placed in a sinking fund and invested by the purchase of certain approved municipal securities.[45] Any surplus bond fund may also be used to purchase any bond issued to finance the project and such bond shall be cancelled and retired when in the judgment of the governing authority of the municipality its interest will be served thereby.[46] If bonds are purchased and cancelled by the use of money remaining as a surplus after the enterprise has been completed, will such action have the effect of reducing the rent that the lessee is obligated to pay? This might seem to be the equitable result because under the lease contract the lessee is to pay rent sufficient to retire the bonds and interest. If more bonds are sold than actually used in the project, the lessee should not be required to pay interest thereon. It probably will frequently appear in the contract be-

[42]American Law Division, Legislative Reference Service, Library of Congress.

[43]2 Mun. Law Serv. Ltr. No. 8: "Be it resolved by the Section of Municipal Law of the America Bar Association: That it is contrary to the interests of local governmental units and to sound public policy for such local governmental units to issue their obligations to provide industrial plants or factory facilities for the direct benefit of private industry."

[44]Miss. Code Ann. §§ 8936-08, -14 (1942).

[45]Miss. Code Ann. § 8936-18 (1942).

[46]Miss. Code Ann. § 8936-19 (1942).

tween the municipality and the company that surplus funds remaining after the project is finished may be used to purchase and retire the bonds, thus having the effect of diminishing the obligation of the lessee to pay rent. This condition should be kept in mind when the contract and the lease agreement are prepared. If, however, the obligation of the lessee to the municipality is to pay a stipulated annual rental and not merely one equal to the annual maturities of the bonds, interest and handling charges, then it would appear that no dimunition in the rent could be made by the use of surplus funds to purchase and cancel the bonds because such act might violate Section 100 of the Mississippi Constitution.

The statute now provides that the bonds may be sold within three years after the date of the election or at the end of any successful litigation affecting the bond issue.[47] Three years ordinarily would seem an adequate time within which the bonds should be sold. If, however, the original bond issue was for an amount considerably more than actually needed and the plant grows rapidly, then it might in some instances be wise to extend the time. In one Mississippi municipality the A. and I. Board approved and the qualified electors authorized the issuance of bonds in the amount of $750,000 for an industrial enterprise.[48] Less than $500,000 of the bonds of the authorized issue were sold. At the end of three years from the date of the election the authority to sell the excessive amount expired. If this plant becomes successful and should need additional funds for expansion, then under the statute another election must be called and the entire statutory procedure followed as in the case of a new enterprise. The election could be against the issue and the growth of the plant curtailed. Since the electors have once authorized the full amount, should not the governmental authority, with the approval of the A. and I. Board, have more than three years within which to sell the remaining authorized bonds if the operation is successful and the plant requires expansion? There should, of course, be a time limit but three years is a short time within which to test the success of a new manufacturing enterprise. Possibly the time could be fixed at five or even seven years.

A prosperous lessee might desire to have a callable provision inserted in the bonds. The call, of course, would not be made by the municipality unless the lessee company so directed. Such action would require that the company provide the money to retire the bonds that are so called. Since the lessee has the obligation to pay the bonds and interest, it should have an equitable interest in the sinking fund and use such amount thereof to apply on the payment. If callable bonds

[47]Miss. Code Ann. § 8936-11 (1942).
[48]Conmar Products Corp., Greenwood, Miss.

are issued, the contract should specify the rights of the lessee and the municipality in the sinking fund when the call is exercised. It certainly does not appear proper for the lessee to pay the bonds and interest on call and the municipality retain the sinking fund if it represents excess money remaining after the project has been completed. It seems that the 1944 statute would authorize the use of such surplus or sinking fund to purchase and cancel the bonds. The A. and I. Board would have to approve the callable provision in the bonds and likewise the application of any surplus or sinking fund to the redemption of the bonds so called.

CONCLUSION

Whatever criticisms may be made concerning Mississippi's BAWI laws, one thing is certain and that is, it works. So successfully has this law been used that Mississippi's per capita income has increased considerably more than the national average. Mississippi has always had its share of poverty and unemployment and it is difficult to conceive a better legal method of alleviating these social evils. Under the modern trend for liberal construction of constitutions, we may look forward to the mere opportunity for employment satisfying the "public use" doctrine. The need for a constant revision of the BAWI laws is obvious because the legislature has predicated its enactments on abnormal conditions. A constitutional amendment which would in substance conform to the thought expressed in that part of the opinion of the Supreme Court of the United States in *Carmichael v. Southern Coal & Coke Co.* quoted above would strengthen the program. This would leave the due process laws of the Constitution of the United States as the only possible legal barrier.

MUNICIPAL TAXATION IN MISSISSIPPI

*Tom T. Ross**

Municipal Taxation in Mississippi includes "Ad Valorem Taxation" and "Other Sources of Tax Revenue." Ad valorem taxation will be discussed under the subheadings of Budgets, Assessment Rolls, and Tax Levies. Included before tax levies is municipal separate school district taxation. This is necessary because a knowledge of the school tax laws is required before the municipal board can make the complete tax levy.

The Municipal Budget Law and the Municipal Taxing Authority were revised and rewritten by the Mississippi Legislature at its 1950 regular session. Since that date a few minor amendments have been added.

Unless one has had previous experience in the administrative department of a municipality, as a clerk, tax collector, municipal attorney, or otherwise, he might imagine himself to be a newly elected municipal official. He is about to come into office, with great expectations as to what he will do for his municipality, and with little or no desire to inflict any unnecessary tax burdens on his fellow citizens. The newly elected official knows that his city has a record of rendering innumerable municipal services in the past. Probably he was elected by promising to improve on that record. He has an idea that there are certain legal restrictions on the use of tax money, and there is no question but that taxes must be assessed and collected to produce that revenue. With his election behind him, and his promises before him, he now becomes aware that he *must* learn how he is to finance this municipality he was elected to head.

Our municipal government—created by law; where the return on the tax dollar is the greatest; where the taxpayer yells the loudest; where the citizens demand the most—is a child of the state. This public organization has only such powers as are expressly granted by statutes and such powers as are necessary and appropriate to the exercise of the powers granted by statute.[1] One must keep in mind that no municipal office holder or municipal governing board has any imaginative or civic authority to tax property, or to use municipal funds. Unless this authority is granted by the legislature, either by express statute, or by the necessary and appropriate powers that go to exercise the rights expressly granted by statute, *it does not exist.*

In the fourth quarter of the 1956-57 fiscal year the present municipal officials prepare the municipal budget for their first full fiscal year

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[1]Davenport v. Blackmur et al., 184 Miss. 836, 186 So. 321 (1939).

in office, which is from October 1, 1957, to September 30, 1958. Municipal officials take office the first Monday of July, 1957, for a term of four years. The legislature has seen fit to cause the taking of office by the newly elected officials to be in the fourth quarter of a fiscal year.[2]

MUNICIPAL AD VALOREM TAXES

The Budget

The office holder cannot know what taxes or revenue to produce for any fiscal year until he is first advised of the amounts that will be required to operate the departments and services of the municipality for that fiscal year. The first battle of the municipal official will be in the preparation of the municipal budget for the coming fiscal year. In an effort to make the municipalities operate within their respective incomes and to direct the setting up of a municipal plan of expenditure of the funds, the legislature adopted the Municipal Budget Law.[3] By this law, the municipal year, or fiscal year, begins the first of October and ends the thirtieth of September. The municipal authorities are directed to prepare at their September meeting a complete budget of municipal revenues and expenses, estimated for the next fiscal year, and to prepare a statement showing the actual revenue during the current year, which statement shall show every source of revenue, along with the amount derived from each source. This budget must be published in a local newspaper during the month of September in municipalities with a population of 1,000 or more, and posted in three public places in small municipalities. The budget is prepared or made on forms provided by the state auditor, and the municipal clerk is required to keep a set of books containing the city accounts under headings corresponding to the several budget headings. The municipal expenditures must be kept within the sums named under the headings.

This budget law provides for strict compliance with the respective appropriations as to expenditures, setting penalties and personal liability on the part of officials voting to exceed the budget. On the other hand, it provides for a few emergency expenditures for events or casualties that could not have been anticipated at the time the budget was made up. The budget law specifically names as emergency items fire, explosion, cave-ins and election expenditures, but this term "emergency" does not include the right to exceed the budget for the usual expenditures of municipal operation. The office holder will misconstrue the term emergency at his own risk. "Emergency" shall not be confused with public fancy, personal desires of the municipal officials, or the pressure

[2]Miss. Code Ann. § 3374-62 (1942).
[3]Miss. Code Ann. §§ 9121-01 to -20 (1942).

of special groups seeking developments that are beyond the bounds of the budget. All in all, the Mississippi Budget Law is a strict regulation of municipal officials in regard to the expenditure of municipal funds. The forms prescribed by the state auditor for the preparation of the budget, and the subsequent publication thereof, are such that a complete picture is given to the public each year of municipal revenues and expenditures.

In preparing the annual budget, the city officials determine the total funds necessary for the operation of the municipality for the coming fiscal year in the following manner:

The heads of the several departments of the municipality, such as the fire chief, chief of police, head of the street department, and others, having to do with the rendering of municipal services, prepare the budget of their respective departments for the coming fiscal year. These department heads consider the salaries, uniforms, supplies, equipment and capital investments that they used during the current fiscal year, and with this as the basis, they consider the increase or decrease of the services that will be required of the respective departments for the ensuing fiscal year. The several department budgets are considered, discussed and passed upon separately by the city council. They are studied, analyzed, and cut or added to, as the demands for them and the means to produce them occur. As sub-budget after sub-budget is completed, there remain what might be called fringe cases. Usually there are new projects or growth of old projects, small groups of people with intense interest in some particular phase of municipal service, and very often, most worthy causes that cannot be afforded. Finally, the complete budget is compiled and set down on the form of the state auditor and published during September.

Consideration of Funds Other Than Ad Valorem Taxes Shown by the Budget

From the budget, the municipal officials determine what funds the municipality will have left over from the closing fiscal year, and what revenue or funds must be produced to operate the city during the coming fiscal year.

Having determined the expense and the necessary revenue that must be produced for the operation of the municipality, the municipal board then estimates what revenue, other than through ad valorem taxation, can be expected to be produced during the coming fiscal year. This estimate will include such items as the expected income from the police department, rents, revenues, or franchise taxes to be received from public utilities such as the telephone company, the natural gas company, or in case of municipally owned utilities, the revenues therefrom; the muni-

cipal privilege taxes and sales taxes; and all other municipal revenue. This estimated sum will be added to any cash balance that is carried over from the closing fiscal year. Any additional funds necessary to operate the city for the coming fiscal year must be produced from municipal ad valorem taxes.

Under the council-manager plan it is the duty of the city manager to prepare and recommend to the council an annual budget.[4]

The Municipal Assessments of Property and the Municipal Assessment Rolls

As stated, in 1950 the legislature rewrote the tax law as to municipal ad valorem taxes.[5] All property within the municipality, real and personal, on the first of January of each year, is subject to assessment and ad valorem tax levies for that year. This law provides the form of assessment rolls, authorizing municipalities to follow the county rolls or to provide for separate assessment by the municipal assessor each year. The manner of assessing public utilities and public car companies is provided,[6] and also the method of assessing motor vehicles.[7]

The writer has had no experience with municipal assessments where the municipality follows the county assessment rolls. It appears that the great majority of municipalities employ the system wherein the municipal assessments are made by the municipal tax assessor each year. This discussion on municipal assessments concerns this procedure.

From Miss. Code Ann. §§ 3742-01 to -46 (1942) the procedure of municipal tax assessing is determined.

The municipal tax assessor assesses all taxable property within the boundaries of the municipality, and in the case of a municipal separate school district having added territory, within the boundaries of the added territory also. He shall complete the assessment, both of the real and personal property, and file the assessment rolls, with the proper affidavit attached, with the municipal clerk on or before the first Monday of September, unless the governing authorities shall fix a different date. The actual assessment of the taxable property is required before a municipal tax rate sufficient to produce the necessary revenue can be levied. The object of the assessing of property is to assess all taxable property within the municipal boundaries on an equal basis, or on as nearly an equal basis as is possible. These assessments are completed within the same period in which the budget is prepared. The general idea is that the assessment rolls will be made available when the

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[4]Miss. Code Ann. § 3825.5-17 (b) (1942).
[5]Miss. Code Ann. §§ 3742-01 to -46 (1942).
[6]Miss. Code Ann. §§ 3742-04, -05 (1942).
[7]Miss. Code Ann. §§ 9352-65, -66, (1942).

budget is completed. In this manner the governing authorities can work from that point to determine the necessary tax levies to produce the required revenues. The procedure of tax assessing is contained in simple and easily understood terms in the code sections.

In the past, municipal assessments have been set aside because of some technical omission of the tax assessor. In *Hunter v. Bennett*[8] the Mississippi Supreme Court held that the assessor's failure to file a roll within the time prescribed made the roll void. Apparently, the legislature had in mind the putting of municipal tax assessments on a more workable basis when it provided in the 1950 tax law that the failure of the assessor to certify to or swear to the assessment rolls, or to return it on the date named for its return, or the failure to do any other act with respect to the rolls, shall not affect the validity of the assessments, if it is corrected, revised, and approved by the municipal authorities.[9]

This 1950 section of the law further provides that by their order the governing authorities shall prescribe the form of the personal assessment rolls, except that the personal assessment rolls shall be made annually in every municipality. The municipal assessor is further required to make a recapitulation of the real and personal rolls, showing the total of each column of the entire rolls and the total assessment.[10] When the assessment rolls are completed and filed with the municipal clerk, the governing authorities correct and revise them, bringing into the rolls any omitted property, and increasing or reducing any assessments, as the case may require, so as to cause all of the taxable property within the municipality to be assessed on as near an equal basis as is possible.[11]

The time for receiving the assessment rolls is at a regular meeting of the governing authorities to be held in October, unless a different time is set by order. When the equalization of these rolls is completed, ten days notice to the public is given by publication in a local newspaper or if no local newspaper is published, then by posting of notice in five public places in the municipality, of a regular or special meeting of the governing authorities where objections to the assessment rolls will be heard.

At the meeting for hearing objections to these rolls, the governing authorities take up and hear any objections to the assessments and they may then raise or lower any assessment so as to equalize it with other assessments. After these hearings are completed, the real and personal rolls shall be approved by order of the Municipal Board entered on its minutes.[12]

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[8]148 Miss. 368, 115 So. 204 (1928).
[9]Miss. Code Ann. § 3742-07 (1942).
[10]Miss. Code Ann. § 3742-09 (1942).
[11]Miss. Code Ann. §§ 3742-10, -12 (1942).
[12]Miss. Code Ann. §§ 3742-14, -15 (1942).

Any taxpayer or person owning or having any interest in any property, feeling aggrieved at the action of the governing authorities in equalizing and making final the assessments, shall have the right to appeal to the circuit court[13] within twenty days after the adjournment of the meeting of the governing authorities at which the final approval of the assessment rolls is entered on the minutes.[14]

Upon the completion of these assessment rolls they should have included therein the total of the assessments on each page which totals will be recapitulated so as to show the total of the assessments on the rolls.

We stated above the manner of assessing railroad property and private property and private car companies[15] and the manner of assessing vehicles.[16] The state tax commission is designated as state assessor of railroads and other public service corporations.[17] The state tax commission assesses the property of railroads, telegraph, telephone, sleeping car, express, electric power and light companies, and other public service corporations liable to taxation in the state, and forwards to the sheriff and tax collector of each county the assessment of the property in his county. The municipal tax assessor, or clerk, receives from the sheriff and tax collector of his county these assessments insofar as they pertain to this property situated within the boundaries of the municipality. This is entered on the municipal assessment rolls in appropriate form as the municipal assessments against this property.

The assessment of motor vehicles is made by the county tax assessor from the list of tags of vehicles in the county.[18] When this list is supplied the tax assessor by the county tax collector, he estimates and assesses the motor vehicles described therein as other personal property is assessed for taxes. While the actual assessments in each county are made by the tax assessor, the Tax Assessors' Association of Mississippi operate a plan where this association each year appoints a committee that determines the values of different motor vehicles according to their respective model and age. This list for each county is sent to the sheriff and tax collector and is used by the tax assessor in determining the assessments against this property. The municipal tax assessor is not relieved of making the actual assessment against the motor vehicles but the established values are used by him as a guide.

The assessment rolls are shown in three totals, one for the real estate, one for the personal property, including motor vehicles, and one for

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[13]Miss. Code Ann. § 1196 (1942).
[14]Miss. Code Ann. § 3742-17 (1942).
[15]See note 6 supra.
[16]See note 7 supra.
[17]Miss. Code Ann. § 9825 (1942).
[18]Miss. Code Ann. §§ 9352-65, -66 (1942).

the public utilities, such as railroads, telegraphs and so forth. A grand total of all of the assessed valuation is brought forward.

Minimum Program Local Ad Valorem Tax Effort and Supplementary School Tax Effort

Since the municipal tax levy is involved with the municipal separate school district tax levy of which the municipality is a part, the newly elected city official must know the connection between the municipal separate school district and the municipality before he goes into the tax levy.

The municipal separate school district is governed by a five-man board of trustees appointed by the governing authorities of the municipality. Municipal officials are prone to allow the public to believe that the municipal board has the authority to determine what will be spent for school purposes. A wise city official will see that the public is fully advised as to what part the municipal board plays in the municipal separate school district taxes and as to what part the school board of trustees plays in these taxes.

The state appropriates to each municipal separate school district funds under what is known as the "Minimum Program Fund." The school district is required to supplement these state funds with ad valorem taxes on property within the school district. This is known as the "Minimum Ad Valorem Local Tax Effort." A municipal separate school district is authorized to raise additional funds for school operations by ad valorem taxation. This is referred to as the "Supplementary Tax Effort." The board of trustees of the municipal separate school district prepares an annual budget that will show what funds are necessary to operate the school for the coming fiscal year. This budget is filed with the municipal governing authorities who must accept it, and who have no authority to reject it.[20] While the municipal authorities have no part in the preparation of a school budget or in the determination of what will be spent for school purposes, this school budget is included with the regular municipal budget, entered on the municipal minutes and published. On or before the fifteenth of July of each year, the school board must file with the State Board of Education a copy of the school budget for the coming fiscal year. With this school budget and other information the State Board of Education determines what the state will contribute towards the "Minimum Program Effort,"[21] and what must be produced from local taxes to supplement the "Minimum Program Effort." The sum

[19]Prior to the school laws of 1953, the municipal board could reject a school budget.

[20]Miss. Code Ann. § 6518-02 (1942).

[21]Miss. Code Ann. § 6518-06 (1942).

to be produced from local ad valorem taxes to supplement the "Minimum Program Effort" is certified by the State Board of Education to the governing authorities of the municipality on or before the first of September of each year. Further, the board of trustees of the municipal separate school district may determine what additional funds are necessary to operate the school and they will certify this amount to the governing authorities of the municipality on or before the first of September of each year.[22] Schools operating kindergartens may be financed from the supplemental tax effort, or in certain municipalities of 10,000 population or over located in the Yazoo-Mississippi River District, in counties bordering the Mississippi River, a tax levy of two mills for kindergarten purposes shall be levied if requested by the school board of trustees. An additional tax levy is necessary for any amount necessary to retire the school bonds and interest, or like debts, maturing during the coming fiscal year.

In the preparation of the budget the school board determines the necessary cash funds needed and then assesses the school taxes.

Having received the school budget and the information from the State Board of Education, together with the requirements of the school board as to the supplementary school funds and kindergarten levy, the governing authorities of a municipality are required to levy a sufficient tax expressed in "mills on the dollar" against all of the taxable property in the municipal separate school district, of which the municipality is a part, and including added territories, if any, to produce these necessary funds.

Homestead Exemptions

The municipal official must now consider the homestead exemptions and the law authorizing the same, before he makes the tax levy. There are exemptions from municipal taxes of church property, public property and like property.[23] No discussion will be made of these sections as they are full and complete. Of more difficulty is the homestead exempt property.

Homestead exemptions as to taxation are covered generally by Miss. Code Ann. §§ 9714 through 9743.5-11 (1942). This law does not exempt the homestead from *municipal taxes or from levies for school bonds and interest.*

Miss. Code Ann. § 9714 (d) (1942) limits the homestead exemptions to an assessed valuation of $5,000 from ad valorem taxes levied for the support of the "Minimum Education Program" of a municipal separate school district to produce the minimum local ad valorem tax effort re-

[22]Miss. Code Ann. §§ 9673-713 (1942).
[23]Miss. Code Ann. § 6518-02 (1942).

quired of such municipal separate school district within the limits as authorized by Miss. Code Ann. § 6518-02 (1942) and supplementary tax levy for the support and maintenance of the schools of a municipal separate school district within the limits and as authorized by Miss. Code Ann. § 6518-06 (1942). The total of the levies made under these two sections which shall be exempt under the homestead exemptions act shall be limited to *fifteen mills* for any affected property area. This act includes additional exemptions not to exceed twenty mills for certain special municipal separate school districts.

The "Minimum Program Local Tax Effort"[24] and the "Supplementary Tax Effort"[25] have limits on the tax levy to the extent that the supplementary tax levy does not exceed fifteen mills, or the amount of the tax levy for the local tax effort in the minimum education program is less than twenty-five mills—or in counties of 15,000 population, or less, in which the separate school district constitutes the whole county—twenty-five mills, whichever rate is greater.

Miss. Code Ann. § 6518-08 (1942) also provides that these tax levies are exempt under homestead exemption law, but the exemptions are limited to fifteen mills.

Miss. Code Ann. § 6518-09 (1942) provides that taxes of the municipal separate school district shall be collected by the municipal tax collector and placed in the municipal depository to the credit of such school district.

In the printing of the tax receipts,[26] homestead exempt property must be shown as such with the amount of the tax, and also the amount the tax would have been had there been no homestead exemption.

The Tax Levy

In October of each year, or at any other regular, adjourned, or special meeting, the governing authorities of a municipality shall levy the municipal ad valorem taxes for the fiscal year next proceeding, and the school tax, and shall, by resolution, fix the tax rates or levies in mills, or a definite fraction of a mill, on the dollar. These tax levies determine the ad valorem taxes that will be collected upon each dollar of valuation of the assessment rolls except as to such values as may be exempt, in whole or in part, from certain tax rates or levies, principally homestead exemption.[27]

Authorizing the tax levy, Miss. Code Ann. § 3742-23 (1942), is as follows:

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[24]Miss. Code. Ann. § 6518-06 (1942).
[25]Miss. Code Ann. § 3742-18 (1942).
[26]Miss. Code Ann. § 9824 (1942).
[27]Miss. Code Ann. § 3742-23 (1942).

"In making the levy of taxes, the governing authorities shall specify in such resolution the levy for each purpose as follows:

(a) For general revenue purposes and for general improvements, as fixed and limited by House Bill No. 77 (Ch. 496), of the Laws of 1950 (§§ 9882, 9883).

(b) For school purposes, including all maintenance levies, whether made against the property within such municipality, or within any taxing district embraced in such municipality, as fixed and limited by House Bill No. 77 (Ch. 496), of the Laws of 1950 (§§ 9882, 9883).

(c) For municipal bonds and interests thereon, for school bonds and interest thereon, separately for municipal-wide bonds and for the bonds of each school district.

(d) For municipal-wide bonds and interest thereon, other than school bonds.

(e) For loans, notes or any other obligation, and the interest thereon, if permitted by law.

(f) For special improvement or special benefit levies, as now authorized by law.

(g) For any other purpose for which a levy is lawfully made.

If any municipal-wide levy is made for any general or special purpose under the provisions of any law other than House Bill No. 77 (Ch. 496), Laws of 1950 (§§ 9882, 9883), each such levy shall be separately stated in the resolution, and the law authorizing same shall be expressly stated therein. (Supersedes § 3722, Code of 1942)."

Note the statutory provisions requiring that the resolution making the tax levy contain the legal authority under which the several levies are made. Particularly is this necessary in setting forth the levy of the "Minimum Program Local Ad Valorem Tax Effort" and the "Supplementary School Tax Assessment," as this information is necessary to provide the homestead taxpayers the benefit of the homestead exemption law.

Ad Valorem Tax Collections

Ad valorem taxes become a lien against the taxable property within the corporate limits of the municipality the first day of January of each year. These taxes are delinquent on the first day of February of the following year. The assessments should be completed and the tax levy made in time for the preparation of the tax receipts for use around the first of December of each year. The taxpayers begin paying taxes about the fifteenth of December. The writer is unable to locate any law that definitely states when these taxes are first due.

Miss. Code Ann. § 3742-18 (1942) provides for the printing of the tax receipts and prescribes the form to be used. The receipts are made in triplicate, numbered serially by the printer and delivered to the municipal clerk. The clerk makes a record of the receipts by numbers and at the end of the fiscal year credits the tax collector with the unused receipts. The municipal clerk and the municipal tax collector are often the same person, but the statutes designate the tax collector for certain jobs. The property taxed must be described in the receipt, the total assessment shown, the page and line of the assessment rolls for the property set forth, and, on homestead exemptions, the exemptions must be shown. The tax levy is stamped or printed on the receipt, and in the case of homestead exempt property there is shown what taxes are due and what taxes would have been owned had there been no homestead exemption.

The tax levy as stamped on the receipt must be itemized, showing the millage for each purpose, including the school levies, bonds, interest and debt levies. Upon the payment of the tax the receipt is delivered to the taxpayer and copies filed in the appropriate records by the tax collector. The law provides what can be used for tax payments but for all practical purposes any type of money or currency or any good check by a solvent taxpayer is acceptable.

A large majority of the tax collectors, or municipal clerks, mail or give tax statements to the property owners. This is a matter of courtesy and public service beyond the legal requirements.

Although the law requires that the tax levies be itemized on the tax receipts, often the tax statements are given to the property owners with the total millage stated, with no further explanation. The property owner receives his statement and sees this large millage which includes both the city taxes and the school taxes. He is agonized for several weeks over having to pay the tax. Having received the statement from the city clerk, he assumes and believes that the governing authorities imposed all of these taxes on him. If a clerk or municipal official is conscientious enough to accomodate the public by preparing and mailing the tax statements, this same official should go to a little extra trouble and itemize on the statements the tax levies so that the property owners will know what part of the tax levy constitutes municipal taxes and what part of the tax levy constitutes the school taxes.

Collection of Delinquent Taxes

The unhappy task of collecting delinquent taxes falls on the tax collector. Miss. Code Ann. § 3742-32 and the several following sections set forth the manner of sale and redemption of real estate for ad valorem

taxes and assessments. The sales are made on the first Monday in April following the county sale, with the owners having two years from the date of sale to redeem. The sale is a public auction, usually at the front door of the city hall, but the municipal authorities must designate by an ordinance the place where the municipal tax sales are to be held.

The collection of delinquent municipal personal taxes is authorized by Miss. Code Ann. § 9898 (1942). The tax sale of personal property for delinquent municipal taxes is identical to the sale for county taxes, except that the sale must be advertised in the manner and made at the place designated by city ordinance. The municipal ordinances generally contain provisions similar to those for the county as to advertising—that is to say, five days notice posted in three public places, and the front door of the city hall is usually designated as the place of sale of personal property. Likewise, cumbersome property is sold at its location.

Apparently the seizure and sale of personal property for delinquent taxes has given the municipal tax collector considerable trouble. The fact that the Attorney General has been written on numerous occasions for opinions is illustrated by the following opinion addressed to the city attorney of Natchez, which appeared in the October 1953 issue of the Mississippi Municipal Association News:

> "The applicable statute is Section 9898, Code of 1942, which provides that upon default in the payment of taxes the tax collector shall proceed to collect same by distress and sale of any personal property liable therefor. The process of distress is not a judicial procedure, and in seizing the property, it is my opinion that the tax collector of the municipality should issue a distress warrant directed to the proper office which officer shall serve the warrant, seize the property and turn same over to the tax collector. The tax collector would then proceed to advertise the property for sale and conduct the sale in the manner provided by the statute in question."

There is also a code section that authorizes a tax collector to proceed before the taxes are due against property about to be removed from the county by seizing and levying on enough of the property to pay for the tax. This section is seldom, if ever, used.

The courts of Mississippi have set aside tax sales for delinquent personal property taxes where property valued greatly in excess of the tax has been arbitrarily sold for a small consideration. It appears to be the policy of the courts to protect owners of personal property against the useless sacrifice of their property at a tax sale for personal taxes.

Changes in the Assessment Rolls After the Approval by the Governing Board

Your attention is called to Miss. Code Ann. §§ 9815, 3742-20 (1942) at this point because these sections give fourteen grounds for which changes in the assessment rolls can be made at any time prior to the thirtieth of September, and provides for this procedure in municipalities. Although legal notices are inserted in papers and the taxpayers know there is a proper time to contest or question their assessments, a great number of them wait to contest their assessments until after the rolls are equalized and approved by the governing board. They usually appear when they receive the tax statement, or when the last day for tax payments has arrived, or just before a tax sale. After being approved by the governing board, the assessment rolls can be changed and corrected during the fiscal year, which ends September 30, for any one of the fourteen grounds named in the statute, but for no other. The authority of the governing board is limited in this respect, and a municipal official should look to this law before accomodating late objectors. The assessment rolls cannot be changed or altered after the end of the fiscal year.

Payment of Taxes in Installments

The municipal tax law authorizes the payment of ad valorem taxes in installments as follows: one-half of the tax is due the first of February; one-fourth may be paid on or before the first of May; and one-fourth on or before the first of August.

Deferred payments bear interest from the first of February until paid at one-half of one per cent per month. While the law provides for full payment of certain of the levies by the first of February, there is a provision that, by ordinance, municipalities may authorize partial payment of all of the tax levies. Tax sales may be made for delinquent installments in the same manner as is above stated, except as to the date of sale.

Special Assessments

Any property subject to special municipal assessments, such as paving assessments, curb and gutter assessments, and like charges authorized by law, have included on the tax receipt of that property the installments of principal and interest on the special assessments that are payable that year. Well prepared assessment rolls include the installment due opposite the property. Default in the payment of any such installment authorizes a sale of said property in the manner provided for delinquent taxes.

MUNICIPAL TAX REVENUE OTHER THAN AD VALOREM TAXES

The principal sources of municipal tax revenue other than ad valorem taxes are the franchise tax, the privilege license, and the municipal sales tax. By these additional tax revenues the municipalities are able to place some of the costs of municipal government on all of the recipients of the municipal services.

Municipal Franchise Tax

Miss. Code Ann. §§ 7716-01 to -38 (1942) concern the Public Service Commission and define its power and jurisdiction, which includes jurisdiction over most public utilities. Miss. Code Ann. § 7716-05 (e) (1942) provides that public utilities or other persons or corporations, operating under a franchise that authorizes the use of streets, alleys, or other municipal property, including any co-operative, shall pay to the municipality compensation therefor at the rate of two per cent of the utility's gross revenue from sales to residential or commercial customers within the municipality, or two per cent of the monthly service; such payments to be made quarterly. This act provides that it shall not be construed to apply to television stations, radio stations, or community television antenna service. A municipality has authority, outside of this act, to contract for a franchise license or tax for such a utility as a television antenna service using the city streets, alleys or other property.

The City of Meridian is involved in a lawsuit with the Southern Bell Telephone and Telegraph Company wherein the right of that city to tax said company under this law is contested. The outcome of this litigation will affect all of the municipalities in Mississippi.[29]

The Privilege Tax Code

Miss. Code Ann. §§ 9696-01 to -236 (1942) contain section 2 of the Privilege Tax Code, which is for lacol privilege taxes. Municipalities are divided according to population into seven classes under this act. The amount of local privilege taxes for each business under this law is determined by the type of business and type of municipality where the business is conducted. The tax must be paid before business is begun and anually thereafter. The law sets out in detail the manner of making application for the tax, the payments thereof, the keeping of the tax record by the municipal tax collector and the annual accounting of the tax collector to the municipal board. The collection of this tax is mandatory on the

[29]Editor's note: This case has been decided by the federal district court since this article was written. See Southern Bell Tel. & Tel. Co. v. City of Meridian, 154 F. Supp. 736 (S.D. Miss. 1957).

municipal tax collector and penalties are provided for willful failure to make collection.

It is interesting to note that any person desiring to engage in business in a municipality is liable for the tax if the municipality has adopted the privilege tax code.[30] Miss. Code Ann. § 9696-235 (1942) provides that it is the intention of the act that the levy and collection of the privilege taxes shall be mandatory and not optional. As far as the writer can find, the privilege tax code does not state how a municipality should adopt this tax. Ordinarily, municipalities desiring to collect privilege taxes (and all of them do) adopt the privilege tax code by an ordinance. With an ordinance, the question remains as to whether the ordinance is sufficient to protect the municipality as to future amendments to this act by which the amount of present privilege license is changed, or other businesses are brought under the tax.

As with the collection of delinquent personal ad valorem taxes, the municipal tax collector is perplexed as to what procedure should be taken to collect delinquent privilege taxes. The law makes the collection of the tax mandatory on him and subjects him to penalties for willful failure to collect, and also to a penalty of $100 to the state on his official bond.

Miss. Code Ann. § 9696-228 (1942) provides:

> "Any persons failing to pay the privilege tax imposed by this act, and to obtain a license as hereby required . . . may be proceeded against by suit . . . and the officer required to collect the tax may seize and sell any property of such person liable for such tax and the penalty, in the same manner as he may distrain and sell property of other taxpayers delinquent for the payment of ad valorem taxes due on personal property."[31]

The Municipal Sales Tax

Miss. Code Ann. § 10,111.5 (1942), enacted at the 1955 Extraordinary Session of the Mississippi Legislature, authorizes a municipality to impose a municipal sales tax of one-half of one per cent on the retail sales or gross income made within the city and taxable under the income tax law. This tax is imposed by the act of the governing board adopting the same and including therewith three weeks notice by publication in a local newspaper of the resolution or ordinance adopting the tax. If a petition signed by twenty per cent of the qualified electors is

[30]Miss. Code Ann. § 9696-03 (1942).

[31]Note the above opinion of the Attorney General to the city attorney of Natchez, and see also, Bailey v. Emmich Bros., 204 Miss. 666, 691, 692, 37 So.2d 797 (1947), wherein the court in discussing the privilege tax law stated that while it was not pertinent to the issues in that case, it was relevant as demonstrating a complete statutory scheme as to municipal taxation.

filed with the city clerk before the date set in the resolution or ordinance adopting the tax, an election will be called to vote on whether the tax will be adopted. In the absence of such petition, the tax becomes effective without an election. Under the old law it was necessary to hold an election before the tax became effective. The present law places the responsibility on the qualified electors to call the election if they want to vote on the issue.

The municipal sales tax is directed toward the same sales or revenue within the municipality as is the state sales tax. The tax is collected by the state tax commission along with the state sales tax. When the tax is adoped by a municipality, the governing authorities certify that fact to the chairman of the state tax commission and thereafter the municipal sales taxes are collected. For making the collection, the state tax commission retains five per cent of the collection and remits the balance to the respective municipalities to which it is owed. The remittances are made at the same time the state sales taxes are paid by the commissioner into the state treasury, which is on or before the fifteenth of each month.[32]

Although the municipal sales tax law has been in effect only a few years, the majority of the larger municipalities and a number of the smaller municipalities have adopted the tax. The collections are impressive, often exceeding $10,000 per month for the larger cities. This tax produces an annual tax revenue equivalent to a five mill or better tax levy to a municipality. The sales tax is what might be called a "proper tax" in that it causes all persons of a municipality to participate in the support of that municipality. When enacted and properly handled in the financing of an efficient and businesslike municipal administration, the tax should reduce the tax levies against the real estate and personal property.

The citizens of some municipalities, such as Clarksdale, do not want a municipal sales tax. they fear the results thereof to their businesses, and in Clarksdale they rejected this tax by their vote in 1954. Considering the location of this city approximately seventy miles south of Memphis, Tennessee, with a paved highway connecting the two, there is merit in the contention of a merchant that the tax might be a handicap.

There are a few other sources of tax revenue that are enjoyed by various municipalities. One must remember that there are several types of municipal governments in Mississippi such as the private charter, the code section government, the commission form of government under the laws of 1912, the mayor and commissioners form of government under the laws of 1908, and the council-manager form of government.

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[32]Miss. Code Ann. § 10,127 (1942).

The manner and form in which these several forms of government handle their tax problems will differ in some degree, but as a whole the municipal tax laws are uniform throughout the state. Although present tax laws in Mississippi are adequate to finance the municipalities, our future development will require the enactment of other legislation to produce additional revenue.

MUNICIPAL GOVERNMENT IN MISSISSIPPI

*Charles N. Fortenberry**

GROWTH AND DEVELOPMENT

Until the present century the matter of municipal government was of no personal concern to more than nine-tenths of the people of Mississippi. From the establishment of the first permanent white colony on the Gulf Coast in 1699, through the successive steps of territorial organization in 1798, important additions of land in 1804 and 1812, and admission to statehood in 1817, the area now comprising the state was settled steadily —at times rapidly—but the population remained almost entirely rural. In 1850, when the residents numbered 606,526, only 1.8 per cent of them lived in incorporated places of 2,500 or more and fifty years later, in 1900, the proportion of urban residents stood at only 7.7 per cent.[1] Thus, during the years from 1860 to 1900, when the rapid and spectacular growth of cities was getting started in most other parts of the country, Mississippi's urban development was proceeding at a snail's pace. The progress was only slightly accelerated after 1900, though individual cities, such as Jackson and Hattiesburg, made large population gains during the period 1900-1940.[2]

The following decade saw the first sharp increase in the general population of cities. The percentage of urban residents rose from 19.8 per cent in 1940 to 27.6 per cent in 1950 and there is some evidence that this trend is continuing into the present census decade.[3]

Thus, the trend of settlement, manifestly the result of an agricultural economy, has made Mississippi second only to North Dakota among the most rural states.[4] With the present rate of urbanization, however, the rural character of the population will eventually change. Municipal government, which, concerned less than one-tenth of the people in 1900, now is the principal local government for more than one-third of the population. As such it assumes major importance.[5]

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[1]U. S. Bureau of the Census, 2 Census of Population 24-26 (1950), Table 1.

[2]Ibid.

[3]Ibid. The evidence of continued urbanization is chiefly suggestive. Numerous cities have annexed populated areas during the past six years. Also, the number of farms declined by 35,448 between 1950 and 1954. This indicates that about 150,000 people left the farms during that period. U. S. Bureau of the Census, 1 Census of Agriculture, pt. 22, at 3 (1954).

[4]States with the lowest percentages of urban residents in 1950 were: North Dakota, 26.6; Mississippi, 27.6; South Carolina, 28.8; North Carolina, 30.5. An urban resident by this definition is a person living in an incorporated place of 2,500 or more. U. S. Bureau of the Census, 1 Census of Population 24 (1950).

[5]A projection of the 1940-1950 rate of urbanization growth into this decade would make the 1950 population 32.3 per cent urban. To this might be added the 7.4 per cent (1950 census) of those classed as rural who live in communities of 1,000 to 2,500 inhabitants.

The first community to attain the status of a municipal corporation in what is now Mississippi was Natchez. Settled in 1720, the capital of the Mississippi territory from its organization in 1798 to 1802, Natchez was incorporated in 1803.[6] The influx of immigrants following the Louisiana Purchase in the same year brought other demands on the territorial legislature for incorporation, and fourteen communities were granted corporate status by the time statehood was attained in 1817.

The years from 1817 down to 1892 witnessed the chartering of 325 additional municipalities. From that point the number of incorporated places increased more slowly for a time and then began to decline. Current records of the secretary of state show that of the municipalities now in existence three were chartered from 1930 to 1940, two from 1940 to 1950, and four since 1950. During this period the total number of incorporated municipalities has declined. From 313 in 1930 the number slipped to 270 in 1942. In the nevt decade a further decline was evident and in 1952 the number stood at 263.[7] At the end of 1956 there were, apparently, only 262 active municipalities in the state.[8]

Most of Mississippi's municipalities are small. The 1950 census indicated that only one city is ranked in the 50,000-100,000 population group, six are ranked in the 25,000-50,000 group, and eight others are in the 10,000-25,000 population bracket. Of the remaining municipalities, 13 have populations ranging from 5,000 to 10,000, 25 have populations from 2,500 to 5,000, 63 range from 1,000 to 2,500, and 147 towns and villages have populations of less than 1,000 people.[9] Thus it may be seen that 210 of the state's municipalities have populations which are classified as rural by the Bureau of the Census. While it is true that small municipalities do not have all the problems of urban governments, this does not mean that the towns and villages of Mississippi are not important units of local government.[10]

Although Mississippi has only one city in the 100,000 population class, this city is classified as a "metropolitan area" by the Bureau of the

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[6]Rowland, 1 History of Mississippi 397 (1925).

[7]For the 1930 figure see Satterfield and Urban, Municipal Government and Administration in Mississippi 9 (1950). The 1942 and 1952 figures are from U. S. Bureau of the Census, Governmental Units in the United States 9 (1942); and U. S. Bureau of the Census, Governments in the United States 11 (1952).

[8]Letter from Secretary of State Heber Ladner to C. N. Fortenberry, February 19, 1957. This figure is based on the certificates of municipal elections filed in the office of the Secretary of State.

[9]U. S. Bureau of the Census, Governments in the United States 14 (1952).

[10]By legal definition in Mississippi, incorporated places of 100-300 population are villages, 300-2,000 are towns, 2,000 and over are cities. A law of 1950 prohibited chartering of villages after that date. Miss. Code Ann. § 3347-01 (1942).

Census and is unique in this respect.[11] Metropolitan areas present special problems for government arising out of overlapping jurisdictions, extramural services, and taxation. It should be noted also that in many respects a metropolitan area is a single large city with the attending problems of a larger population.[12]

FORMS OF MUNICIPAL GOVERNMENT

In their state and national governments the people of the United States have, with some exceptions, clung to the traditional forms. In municipal government, however, the form has been the subject of considerable attention and experimentation. Strong statements have been made on the relation between the structure and the efficinecy of these governments. It is probable that some of the enthusiastic advocates of new forms have made exaggerated claims. But while it is true, as always, that no government is good without competent officers and a civic-minded electorate, it is not true, as suggested in Pope's famous couplet, that forms of government are a matter over which "fools contest." Able officials can be hampered by improper machinery and will render the best service only if the form of government is designed for efficient and responsible administration.

The basic forms of municipal government in the United States are the mayor-council type, the commission type, and the council-manager type. The New England town is possibly a fourth type but its evolution over the past century and a half in addition to the fact of the confinement to a single section would seem to preclude its inclusion with the three principal types listed. It should be noted, also, that the American proclivity for diversity has made for many variations on the standard forms.

Mayor-Council Plan

Mayor-council government, by far the most popular in American cities,[13] consists of a mayor as chief executive and a council as a legislative body. Councilmen are chosen by wards or at large or by a combination of these plans. In Mississippi the term "Board of Aldermen" has

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[11]A standard metropolitan area is defined as a county or counties, containing at least one city of 50,000 inhabitants or more, with 10,000 or more non-agricultural workers of which at least 10 per cent are working in the area. At least half of the area's population residing in minor civil divisions must have a population density of 150 or more per square mile and the districts must be contiguous to the central city. U. S. Bureau of the Census, 2 Census of Population, pt. 24, at 15 (1950).

[12]The population of Jackson in 1950 was 98,271, while the Jackson metropolitan area was 142,164.

[13]About 53 per cent of all cities above 5,000 population have this form of government. Int'l. City Managers' Ass'n., The Muncipal Yearbook 71 (1957).

generally supplanted the term "council" but the essential characteristics are not affected. [14]

Cities of this type are usually subclassified as strong mayor-council or as weak mayor-council, depending largely upon the amount of administrative power vested in the mayor. In Mississippi, the weak mayor municipality is generally employed but the powers of the councils vary, particularly in the twenty-two cities with private charters.[15] The council, under the general law governing charters, is composed of the mayor and board of aldermen who constitute the governing body of the municipality. It has responsibility for the management and control of the city, town or village. In cities of less than 10,000 population there are five aldermen elected from the city at large, or, at the discretion of the city authorities, four may be elected from wards and one at large. In larger cities seven members of the council are chosen, six by wards and one from the city at large.[16] Members are elected for a four-year term.[17] The council meets regularly once a month but may be convened in special meetings by the mayor or by written notice of two members.

The mayor is the chief executive of the municipality. Elected for a four-year term, his powers and duties consist of supervising the officers and departments of the city government, superintending the enforcement of laws and ordinances, signing commissions and appointments of non-elective officers, presiding at meetings of the board with a vote in cases of equal division, and veto of ordinances, though his veto may be overridden by two-thirds vote of the board members.

The other popularly elected officers of the mayor-board of aldermen municipality include the clerk, marshall or chief of police, police justice, street commissioner, tax collector, and tax assessor.[18] The mayor and board of aldermen may, in their discretion, make all these offices appointive, but this practice is not general. Naturally, the division of administration among persons not chosen by the mayor reduces the power of the chief executive to supervise and control the city's affairs, and here-

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[14]The word "alderman" is of Anglo-Saxon origin. In early England an "ealdorman" was one governing a shire or territory. Oman, England Before the Norman Conquest 370-71 (9th ed. 1938).

[15]Since 1892 all municipalities have been incorporated under general laws of the legislature. Municipalities voting to retain their private charters (ie., special acts of the legislature) were allowed to do so. Hence 22 municipalities retain private charters. See Hobbs, A Manual of Mississippi Government 6-8 (1955).

[16]Miss. Code Ann. § 3374-36 (1942). Private charters, however, have councils of from four to eight members.

[17]The four-year term for all elective municipal officers was established in 1950. This law lengthened the terms of office in most municipalities and made them uniform. Miss. Laws 1950, c. 491.

[18]Police justices must be chosen only in cities of 10,000 or more population. In smaller cities the mayor may act as police justice and the offices of tax assessor and tax collector may be combined with those of clerk or marshall. In these cities, also, a member of the board may serve as street commissioner.

in lies the appropriateness of the "weak mayor" term. Although he may affect policy through his participation in the activities of the board, much of his leadership must depend on his personal and political influence.

Commission Plan

The commission plan of government, generally considered as a twentieth century innovation, is actually considerably older. The essential features of the plan were embodied in a charter granted to the city of Sacramento in 1863[19] and in the New Orleans charter granted by the Louisiana Legislature in 1870.[20] Both these experiments were short-lived; the Sacramento plan was changed to a mayor-council government in 1893 and the New Orleans plan was abandoned temporarily in 1882. The plan became popular only after it was adopted in Galveston in 1901, following the disastrous tidal wave which swept the city in 1900, and by Des Moines in 1907. It spread rapidly until about 1917 when there were about 500 commission-governed cities. Since then there has been a considerable decline until the number of cities of over 5,000 population with this type of government in 1957 stood at 328.[21] It has been regarded with considerable favor in the South and is the type now employed in such cities as Memphis, Birmingham, and Jackson, Mississippi, along with eleven other of the larger municipalities of this state.[22]

Commission government was designed to overcome the diffusion of authority in the weak mayor form of government by concentrating authority in a small commission of three to nine members, the usual number being five. Collectively the members are the city council with power to legislate and determine municipal policy. Individually, they serve as heads of the administrative departments of the city. One of the commissioners serves as mayor but in some cities the plan is modified to give the mayor considerably more power than other members of the commission.

In Mississippi all but one of the twelve cities employing this type of government have general law charters, and thus are alike in organization.[23] The law provides for a mayor-commissioner and two commissioners to be elected at large for a four year term. The commission as a body exercises all legislative, executive, and judicial powers allowed the city government. These three persons serve as department heads and adminis-

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[19]Cal. Sess. Laws 1863, at 415.

[20]La. Sess. Laws 1870, at 30.

[21]Int'l. City Managers' Ass'n., The Municipal Yearbook 71 (1957).

[22]Id. at 251 (1955). New Orleans abandoned the plan for the second time in 1954.

[23]Vicksburg amended its private charter to establish commission government.

ter the policies they have adopted as a legislative body. The allocation of departments is made by majority vote of the commission but certain departments are customarily assigned to certain members. The mayor-commissioner usually supervises the police department and frequently the legal and finance departments as well. He is the nominal head of the city government and presides over meetings of the commission. He is charged with supervising the general affairs and departments and reports on matters that need the attention of the council. However, he cannot control administration independently of the commission and has no power of veto. Again, as in the case of mayor-board of aldermen government, the mayor may enhance his leadership through personality and political influence.

The Council-Manager Plan

The council-manager plan of government had its origin in this country in 1908 in Staunton, Virginia.[24] It was adopted by Sumter, South Carolina, in 1912, and by Dayton, Ohio, in 1913. Although it spread slowly at first, it gradually became more popular, and on January 1, 1957, was the form of government of 1,401 cities.[25] Some idea of its growing popularity may be gained from the fact that 749 of these municipalities adopted the plan during the last decade.[26]

Essential features of council-manager government are a small council elected by the voters, which is the legislative body of the city, and a city manager, chosen by the council, who is in charge of municipal administration. The council is responsible to the electorate for its policies and ordinances; the manager is responsible to the council for the administration.

These features are embodied in the Mississippi statutes authorizing city manager government. The first of these laws, restricted in application, was enacted in 1948, and the second, applicable to all towns and cities, was enacted in 1953.[27] Thus, this type of government is relatively new to Mississippi and is now employed by three cities and one town.[28] Under the Mississippi law, the governing body consists of the mayor and six councilmen for cities of over 10,000 population and a mayor and four councilmen for small cities, elected for terms of four years.

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[24]The idea may have originated in the German plan of an appointive burgomaster which was the basis of earlier proposals. See Toulmin, The City Manager 25-30 (1917).

[25]Int'l. City Managers' Ass'n., The Municipal Yearbook 260 (1957).

[26]Id. at 271-72.

[27]Miss. Code Ann. §§ 3825.5 -01 to -48 (1942).

[28]The four municipalities and the dates of adoption of the council-manager plan are: Meridian, 1948; Grenada, 1950; Picayune, 1952; Moorhead, 1953.

The mayor is elected from the city at large and members of the council may be elected at large or partly by wards and partly at large, as the voters may decide when adopting the plan. The mayor is the titular head of the government but has no powers (i.e., veto or administrative) except as a member of the city council. The manager is chosen by the council for a term not to exceed four years but the term may be renewed. He may be removed at any time by majority vote of the council, after written notice and hearing, and may be suspended from office pending removal proceedings. The manager has fairly complete powers over preparing and recommending the budget, law enforcement, appointment and removal, contracting, purchasing and supervision of department heads and their employees. However, his powers do not extend to the public schools or to the police court.

In Mississippi, as is proper with this form of government, the manager is subordinate to the council and is not directly concerned with the making of policy. It is clear, nevertheless, that a competent and efficient manager, through his powers to report and recommend to the council and because of his familiarity with municipal problems, could greatly influence policy determination.[29]

Evaluation of Different Forms for Mississippi Municipalities

Any evaluation of forms of municipal government for this state must take into account the vast difference between Mississippi cities and those of most other states. These differences do not relate merely to size; they also concern the social, economic and political characteristics of the people. In choosing a form of government such factors should always be considered and in Mississippi they appear to have special significance.

The long and continued popularity of mayor-council government is certainly some evidence of its worth. Its use in 94 per cent of Mississippi's municipalities indicates that it has strong appeal to the people of Mississippi. Aside from its popularity, the weak mayor variety of mayor-council government, generally employed in Mississippi, has certain intrinsic merits. In small cities and towns, where it is chiefly found in Mississippi, it offers a simple and inexpensive plan of government.[30] Such cities are not confronted with administrative issues arising out of departmentalization of activities and most of them do not require the

[29]A Mississippi law of 1948 provides for a "council form" of government. It is restricted in application so as to apply only to Tupelo, and is, essentially, the same as the weak mayor-board of aldermen government. Miss. Code. Ann. §§ 3825.7 -01 to -11 (1942).

[30]Of the 247 municipalities using this form in 1953, only one had a population of over 25,000, four had populations of 10,000-25,000, 63 had populations of 2,500-10,000, and 147 had populations of less than 1,000 as shown by the 1950 census. Hobbs, op. cit. supra note 15 at 4, 15.

services of a full-time administrator. For them the mayor-aldermen form meets their needs and preserves the best of the Jacksonian traditions of local self-government. In larger municipalities this plan inevitably runs into difficulties. Here administrative departments are established, activities are expanded, and there is no person on whom the responsibility for good or bad conduct of city affairs can be placed. With virtually complete authority vested in the board of aldermen, responsibility cannot be assessed against the mayor, individual aldermen, or against all of them as a unit. Evasion of responsibility is always possible; administration conflicts, inefficiency, and waste are the logical result.

For the larger cities of the state using this plan a possible remedy lies in a substantial increase in the powers of the mayor. The strong mayor-council government, in use in most of the larger cities of the country, provides for concentration of responsibility in the mayor or a person appointed by him. This plan has one advantage over all other forms of municipal government in that it provides for political leadership. Naturally, making an elective officer chief administrator of a city creates problems. Good executives are not necessarily good candidates, and the record of an elective official is frequently of little importance in determining whether he shall be continued in office. Showmanship, ballyhoo and other extraneous factors may decide an election. One solution to these problems is a chief administrative officer appointed by, and responsible to, the mayor. Such a plan has been adopted in such cities as New York, Philadelphia and New Orleans with some success.

Commission government, the most widely used plan among the larger cities of the state,[31] has some advantages over the weak mayor-council government for larger municipalities. It provides simplicity of organization; the same persons that make ordinances and policies administer them. Power and responsibility are concentrated in the hands of a few persons. Closer examination, however, reveals defects in this type of organization. Responsibility, instead of being definitely fixed, is divided among several commissioners. Commissioners thus may shift or evade blame; there is no provision for policy leadership and the enlargement of the powers of the mayor-commissioner, as is found in some Mississippi municipalities, has not overcome this weakness. Even with an enlightened and civic-minded electorate, which certainly is not always present, it is hard to see how the system can produce the best results.

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[31]It is found in Biloxi, Clarksdale, Greenwood, Gulfport, Hattiesburg, Jackson, Laurel, Pascagoula, Vicksburg, and in three smaller cities.

Council-manager government was designed to correct the defects which had appeared in older forms of government by providing for location of responsibility in a single person and for trained and permanent administrators and workers. It is the newest and, in the opinion of most experts, the best plan yet devised. It has been termed the "greatest advance by American cities since the Revolution" and widely hailed as the chief contribution of this country to efficient public administration. There are valid grounds for this enthusiasm. This plan accomplishes unification of administration with direct responsibility to the elected representatives of the people. Given favorable working conditions it should provide the most efficient and responsible handling of municipal affairs. Its soundness of theory and its general success has recommended it to Mississippi where there have been four adoptions since 1948.

The experience of Mississippi municipalities with council-manager government has been too brief to allow an accurate assessment of its operation. There are reasons for believing that it has not been an unqualified success. Probably too much has been expected. Good government is not inevitable under the council-manager form. It contains no magic formula. Unless endowed with a competent council and a qualified professional manager who understand and perform their respective functions and those only, and acceptance by all concerned—council, manager, and voters—of the principle of divorcement of politics from administration, the plan is not likely to succeed. While it has generally worked well in small cities, there are obviously minimum limits in size that should be recognized. This is because the smallest cities and towns cannot afford or properly utilize the services of a professional manager —an essential ingredient of the plan. While the question of what the minimum size should be is debatable, it is hard to see how a municipality of less than 2,500 population can properly apply council-manager government.

The one chief weakness of this plan is the absence of leadership in politics and public opinion. The manager cannot supply this leadership as the logic of the plan indicates and the experience of Cleveland has demonstrated. Neither can the mayor, who is merely another member of the council, be depended on for this function though some mayors have done so successfully.[32] This defect is probably less important in Mississippi than in two-party states, but some thought should be given to the task of enlightened and continuous leadership as a necessary support to a council-manager government. A citizens organization might well fulfill this need. Under the necessary conditions described above,

[32]The outstanding illustration was Murray Seasongood in Cincinnati, Ohio.

this plan should offer efficient government for Mississippi's medium-sized and larger cities.

In the final analysis it might be more advantageous to seek principles rather than forms. Principles of proper administrative organization such as unified responsibility, unifunctional departmentalization, direct lines of supervision and control and sound administrative procedures such as centralized purchasing, uniform accounting, and independent audit can be established under a strong mayor-council city as under the manager plan. A merit system for employees is possible with either. Cities that are sincerely seeking efficient and responsible government will be more interested in results than in the methods by which those results are obtained. While the council-manager system appears to be more conducive of good government than any other plan, a strong mayor-council with an appointive chief administrative officer could effect most of the same results. The form is important but the substance is more important.

PROBELMS OF MUNICIPAL GOVERNMENT IN MISSISSIPPI

The problems of municipal government in Mississippi, as in many states, are legion. The provide a succession of perplexities for city officials; as one is disposed of or deferred another is presented. Too, most such problems are insoluble in a permanent sense and, though laid for the present, they periodically resurrect themselves. Many of the problems come with growth and expansion and are thus the logical concomitant of progress.

The matter of governmental organization well may be ranked as one of the major problems confronting the cities of the state. This has been treated above under a separate heading. Of those problems remaining, three have been selected because they are, in the opinion of the writer, the most important.

Paucity of Income

In these times of growing demands upon government, all jurisdictions of the state are pressed for funds. Yet municipalities would appear to be in the direst need of additional money. Partly by design and partly by circumstance they have been reduced to poverty which in many cases appears to be of serious proportions.

Generally, although varying considerably from state to state, cities derive their revenue from the following sources: (1) general property taxes, (2) sales and gross receipts taxes, (3) licenses and non-business license taxes, (4) intergovernmental grants and subventions, (5) special charges or assessments, (6) fines and fees, (7) rents and interest, and

(8) municipal earnings from proprietary departments or utilities or both.[33]

The powers of Mississippi municipalities to raise revenue are restricted to the methods and sources set out in the general laws governing them or those contained in their private charters. This has caused them to depend largely on the property tax. In addition municipalities derive or may derive revenue from a one-half per cent sales tax, municipal earnings, special assessments, licenses and permits, parking meters, fines and fees, service charges and intergovernmental grants. The sales tax levy, which must be approved by a majority of the voters if twenty per cent of them so petition, is in addition to the three per cent tax levied by the state. Naturally, there is some reluctance on the part of municipal residents to vote the additional levy. Moreover, the amount of revenue that can be derived is definitely limited, although the larger cities are now obtaining from ten to twelve per cent of their total revenue from this source.[34]

Earnings from municipally-owned utilities, except from water plants, are restricted to a relatively small number of cities and cannot be counted on for any considerable amount of net revenue.[35] Special assessments for such improvements as streets, sidewalks, waste disposal facilities and drainage systems increase rather than lighten the cities' financial burden. Street and cemetery lot taxes may be levied only in municipalities of less than 1,000 population.[36] Fines and fees and income from parking meters are of minor importance. Intergovernmental grants or subventions which come principally from the state government are considerable, but are chiefly in reimbursement for property tax revenue lost by the state homestead exemption law. State grants for school purposes, although of aid to municipal communities, are made to school districts and not to municipalities. A recent state-enacted franchise tax of two per cent on receipts of public utilities would provide some additional income for cities.[37]

It thus may be seen that municipalities are forced to rely heavily on the property tax to meet their necessary expenses. The degree to which they are dependent on this source may be seen in the following figures. In the fiscal year ending September 30, 1956, the larger cities derived the following approximate percentages of their local tax revenue from

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[33]U. S. Bureau of the Census, City Government Finances 7 (1956).

[34]Id. at 30,33; Report of Mississippi State Tax Commission, September, 1957. A total of 52 cities have now adopted this tax.

[35]A recent count showed there were 182 water plants, 24 electric plants, and 22 gas plants that are municipally owned. The figures on electric and gas plants include generating and/or distribution plants. See Hobbs, A Directory of Mississippi Municipalities 1-74 (1953).

[36]Miss. Code Ann. § 3374-166 (1942).

[37]The validity of this tax is now involved in litigation.

the property tax: Biloxi, 67 per cent; Greenville, 58 per cent; Hattiesburg, 70 per cent; Jackson, 70 per cent; Laurel, 61 per cent; Meridian, 62 per cent; Vicksburg, 62 per cent.[38] These percentages are not greatly different from those found in many parts of the country, but it should be noted that each of these cities levies a sales tax; in municipalities without this tax the percentage of revenue from the property tax may be expected to be higher. Much has been said about the defects of the ad valorem tax in that it is inequitable, hard to administer, and generally outdated. These defects concern Mississippi's cities less than the fact that it is the mainstay of their revenue systems and is still insufficient to provide the needed funds. It would seem, also, that raising the levies would reach the point of diminishing returns before the gap between revenue and needed revenue is bridged.

Additional light can be cast on the financial plight of municipalities by examination of their bonded indebtedness. The amount of the combined debt is considerable and is increasing.[39] A more serious aspect of the municipal debt, however, is the fact that there are strict state limitations on the amount of indebtedness a municipality can incur. Formerly the state limit was 15 per cent of the assessed valuation of the taxable property, but a 1950 law reduced this limit to ten per cent, though making certain exceptions in the case of bonds issued to finance schools, municipally-owned utilities and industrial development.[40] Many cities have reached, or soon will reach, this limit. Obviiusly, good arguments can be made for restricting the power of cities to get themselves into financial difficulties through excessive borrowing. However valid these considerations may be, they do not contribute to a solution of the problems.

In summary, the municipalities of the state are in a state of poverty which is more or less acute. Important additional revenues are a necessity. None of the sources of income now employed or available would appear adequate to supply their needs.

Expanded Services

The problem of expanded services grows directly out of the financial perplexities of Mississippi's municipalities. While it is true that government at all levels has been called on for greatly increased services, with the natural concomitants of larger budgets and higher taxes,

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[38]U. S. Bureau of the Census, City Government Finances 30, 33 (1956).

[39]The total bonded debt of all municipalities on September 30, 1954, was $106,946,596.23. Mississippi State Department ot Audit, Municipal Receipts and Disbursements and Bonded Debt 117-18 (1953-1954). The executive vice-president of the Mississippi Municipal Association, W. J. Caraway, has estimated the present municipal debt at $140 million. The Commercial Appeal, January 15, 1957.

[40]Miss. Code Ann. § 3598-02 (1942).

cities are under greatest pressure because these demands are magnified by increasing urbanization of the population.

A safe generalization is that Mississippi municipalities are hard pressed, in view of their present income, to maintain the services they now offer. This is no small task. Schools and other public buildings must be repaired and eventually replaced. Patrol cars and fire trucks wear out and pavement breaks under city traffic. A disturbing aspect of this situation, however, is that a great many cities are not presently providing essential services. Only a few cities have police personnel and equipment for modern crime detection and prevention or traffic control. Many cities have no sewage disposal plants; large areas of some cities are without sewers. Education facilities are generally inadequate.

In the face of these facts, however, the state's municipalities must now grapple with the problem of expanding the services they now offer and adding to them. More and better services to municipal residents are the trend of the times and there is no reason to believe that government in Mississippi's towns and cities can stand against it. They will be under pressure for larger, better and more expensive schools, police protection, fire protection, health protection, streets and thoroughfares, and traffic control. Additional services, new to many municipalities, will be demanded in facilities such as parks, playgrounds, swimming pools, public libraries and municipally-owned parking facilities. Civil defense organization and facilities may become pressing municipal needs.

Public schools are generally considered as the field in which expanded municipal services are most urgently needed. National attention has been focused on the crowded condition of the schools while reports of annual increase in the birth rate portend greater congestion for the future. The shortage of qualified teachers and the resulting poor quality of instruction are household bywords. Although Mississippi's situation in this respect would seem less serious than in many states because of a fairly static population, it should be remembered that the municipal population of the state is not static but is rapidly increasing. Increased obligations also arise out of the program to equalize educational facilities. Tremendous outlays are being made, and must be made in order to equalize school opportunities between the races. Further large outlays will be necessary to bring the standards of all public schools up to the national average. Naturally, this is not exclusively a municipal problem. State aid has been in effect and the new program calls for liberalization of this support. National funds, already available for specific purposes, may become available for more general school needs. None of the programs now in effect or in prospect, however, relieves the cities of important expenditures from local sources. State aid is available on a share-the-cost basis, and national funds, if provided, will

doubtless be grants-in-aid rather than outright grants. This means that if municipalities are to equalize their schools and take care of increasing enrollments, both from rising birth rates and increasing urbanization, they must provide substantial sums of money. If improvement in public school education is to be undertaken, through provisions of such things as more and better teachers, enlarged curricula, and facilities for exceptional children, much larger expenditures must be anticipated.

Expanded services in regard to police protection, fire protection, health protection, streets and thoroughfares, and traffic control will be demanded as municipalities grow through natural means and by the migration of rural residents to the towns and cities. The normal assumption that the increased costs will be taken care of by the increased number of taxpayers, however, is fallacious. Large police forces and fire-fighting forces cost more per capita than those found in small cities and towns. To illustrate, the fire department costs of Jackson in 1955 were, roughly, $5 per capita as compared to $4 in Meridian and $3 in McComb. Police department costs per capita for the same cities were, approximately, $7 for Jackson, $5 for Meridian and $3.50 for McComb.[41] Naturally, comparisons of cost without regard to quality of service can be misleading. Standards of service will tend to better in the larger cities. This is not a matter of choice; it must be better in order to be adequate. Thus municipalities as they become larger may expect more expense per capita to maintain minimum standards in fire, police, and health protection and traffic control. Improvement over the minimum requirements will entail even more expense.

In the light of increasing attention to social problems such as juvenile delinquency, as well as to accomodate the increasing leisure and convenience of the public, new and greatly enlarged additional services probably will be demanded of Mississippi's municipalities. Public libraries that adequately serve the reading public are unknown to most cities.[42] A good public library is no longer considered a luxury for the modern town or city, nor is it a service that can depend on private philanthropy. Parks, playgrounds, athletic and recreation facilities, kindergarten and nursery schools are all part of the additional services that are expected of the local government in these times. The

[41]Expenditures for fire department costs were: Jackson, $516,000; Meridian, $179,000; McComb, $33,600. For police department costs the figures were: Jackson, $723,000; Meridian, $250,000; McComb, $38,800. Int'l. City Managers' Ass'n., The Municipal Yearbook 372,408 (1956). The 1955 statistics are used for purposes of comparison since 1956 figures for McComb are not available.

[42]A recent survey revealed that there were 63 public libraries in the state of which only 11 received more than $6,000 a year in support, and 19 received less than $1,000 a year. University of Mississippi, Bureau of Public Administration, People Without Books (1949).

shortened work week, the increasing number of working mothers, and the general concern over the tension-ridden male and juvenile shortcomings can but add to the demand. Most towns and cities have made little more than a start on programs of this sort.

Municipal automobile traffic is increasing and may be expected to increase. Motor vehicle registrations in 1956 rose four per cent over the previous year to a total of over 65,000,000. Deaths from traffic accidents in this period also increased by four per cent.[43] These figures point to the need for better traffic control through improved thoroughfares, and better signalization. The adaptation of radio, electronics and television to these uses may help to provide a solution. Mississippi's problem in this respect is certainly not that of more populous areas, but better service is necessary.

Of more immediate concern to municipalities is the need for parking space for the increasing number of vehicles that crowd their streets, endangering life and property and hampering business activity. The seriousness of this situation has mounted steadily over the past decade, forcing upon municipal governments the task of building parking facilities that private business cannot or will not provide. Such facilities may be partly or wholly self-supporting through charges to customers, but free parking will be more and more expected.[44] This service, presently almost unknown ti municipalities of this state,[45] will be assumed by cities as the public seeks answers to the growing traffic problem.

Planning and Zoning

While municipal planning received little attention in the United States until about fifty years ago, it has rapidly come to the front among the major problems that plague the cities.[46] Zoning, which may be considered as a phase of applied planning, was practiced in a haphazard fashion somewhat earlier but there was no comprehensive municipal zoning ordinance until the New York Act of 1916. Since that time an increasing number of cities have attacked the problem; today more than half the municipalities of more than 10,000 population and three-fourths of those with more than 50,000 inhabitants have official planning commissions. Mississippi cities are well behind the nation as a whole

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[43]Int'l. City Managers' Ass'n., The Municipal Yearbook 420 (1957).

[44]Of 746 cities that operated parking lots in 1956, 215 provided free parking on all lots and 222 provided some free lots. Id. at 425.

[45]In 1956 only three Mississippi cities operated parking lots. Greenville had two with a total capacity of 264 cars, Columbus had one with a capacity of 30 cars, and Clarksdale had one with an announced capacity. Id. at 428-29.

[46]There are, of course, a few early examples of city planning such as L'Enfant plan for Washington in 1791 and Penn's layout of Philadelphia in 1682. The first permanent municipal planning agency was established in Hartford, Connecticut, in 1907.

in this activity; not more than half a dozen municipalities have planning agencies and programs in actual operation.

City planning, reduced to its simple meaning, is merely the shaping and re-shaping of the physical development of the municipality. Its purpose is to make a more desirable community. Properly applied it promotes health, safety and convenience. While aesthetic considerations are not a primary purpose of planning, it is natural that a well-planned city would be more beautiful and attractive. The erection of buildings, streets, industrial plants, and residences involve large financial expenditures. It is but natural that such construction, fitted to an overall plan designed for safety, efficiency, convenience and beauty, would not only serve better their purposes but would also save considerable sums of money. City planning can effect these improvements and economies at a relatively small cost to the public.

Ideally, it would seem that a plan for a municipality should be adopted at its founding on the order of the L'Enfant plan for Washington in 1791. Unfortunately this was not the practice when most cities were begun. Even if this had been done the numerous changes wrought by the coming of skyscrapers, the automobile, the airplane, metropolitan areas and other developments of urban communities would have rendered most of them unusable. Certainly the problem is made vastly more difficult because most cities were built without a plan and thus have central and vital areas that can be re-designed only at prohibitive expense. Mississippi's cities are somewhat fortunate in this respect. Until recently urban growth was small and the more rapid increases in their population may well be ahead. Thus they can avoid many of the mistakes that other cities have made through lack of planning. Building by a plan is far easier and less expensive than rebuilding.

The zoning law for Mississippi municipalities dates from 1926 when the first enabling act was passed by the legislature. As amended in 1938 and in 1946, it provides that any municipality of 1,000 or more population may adopt a zoning ordinance for the purpose of promoting the "health, safety, morals, or the general welfare" of the community.[47] In 1956 another act was passed, authorizing municipalities and counties to act jointly in the establishment of planning agencies and planning programs and authorizing the levy of a one-half mill tax to finance the provisions of the law.[48] These statutes provide the customary notice and hearing on zoning or regulatory acts or ordinances and for enforcement of measures agreed upon. They also authorize the acceptance of federal, state, or private grants for furthering a planning program.

[47]Miss. Code Ann. §§ 3590-94 (1942).

[48]Miss. Laws 1956, c. 197. Cities and counties can also act separately under this law.

Thus it would appear that the state's municipalities lack only the initiative to establish functioning agencies and projects in order to secure the benefits of orderly development. This is not the whole case. Two vital aspects of the problem—men and money—are not solved by existing legislation. Although planning is not expensive as compared to most municipal functions, it requires considerable money, especially in the preparation of the initial plan, and most cities find other and more pressing needs for their limited funds. There is also the lack of expert planning assistance without which planning commissions cannot function sucessfully. Naturally, the usual public apathy and lack of understanding of the benefits of municipal planning are also a part of the problem.

The national government came to the aid of small cities in the National Housing Act of 1954, which made federal funds available to cities of 25,000 or less for planning assistance. Under this law as much as fifty per cent of the cost of such programs will be borne by the national treasury if a state agency for municipal planning, financed by state funds, is established. Under the arrangements envisaged by this law most of Mississippi's towns and cities could have planning service at perhaps one fourth its total cost. Since no state agency exists for receiving and administering these funds, the towns and cities of Mississippi are unable to enjoy these advantages.

Mississippi is practically alone among the states of the Southeast in its problem of municipal planning. Municipalities of the surrounding states of Alabama, Arkansas, and Tennessee all have or can have planning service, most of it with state and federal aid. Early attention to the matter in this state can avoid much of the difficulty that will be encountered later. The expected growth and industrial development of municipalities make the problem urgent.

CONCLUSION

The above pages have been devoted to tracing the growth and development of municipalities, an explanation of the different types of government they employ, and a brief treatment of the more important problems that face them. All these three aspects of municipalities are interrelated and interdependent. Progress or improvement in one will be affected by, and somewhat dependent on, progress or improvement in the other two.

The variety of factors which influence urban growth and development precludes accurate predictions as to the future. One safe prediction is that urban populations will continue to grow more rapidly than the total population. More and more people will live in urban communities. This does not mean, however, that they will seek resi-

dence in Mississippi municipalities. They will probably live, or tend to live, in the most desirable communities. If these are found in Mississippi they will grow accordingly. The governments of Mississippi's municipalities have much to do with their desirability as communities. Generally a democratic government will be desirable to the degree that it practices efficiency and renders the proper services. A responsible, elective legislative body, a unified administration properly organized and supervised, a competent and permanent staff of employees, and an overall *esprit de corps* sustained by a civic-minded electorate are the essential attributes of good—and desirable—municipal government. They are more likely to be present under the council-manager form but they also may be accomplished under a mayor-council government or, possibly, under a commission plan. The most important work of municipal governments is administration; a sound administrative system can accomplish good results with various kinds of legislative bodies.

The problems that face Mississippi's municipalities do not admit of easy solution. It is difficult to see how they can solve them by their own efforts, in view of the state constitutional and legal restrictions under which they operate. A sound approach to these problems, however, would be to exhaust whatever remedies are now in the cities' hands. If cities will reorganize and systematize their governments, put their employees on a merit basis, plan their physical developments, and apply principles of efficient administration to fiscal and revenue affairs, they can realize substantial economies that will make a good start toward the services their citizens need and deserve. If these are accomplished or are in the process of accomplishment, municipalities can, in good conscience, seek the aid they must have from state and national governments. If the problems of municipalities are to be finally solved, the legislature must give cities freedom to work out their own problems or the legislature must provide a solution. The former would seem to be the wiser policy.

THE PROBATION AND PAROLE ACT OF 1956

*Bruce C. Aultman**

"But for the Grace of God, there goes John Bradford." Thus spoke a sixteenth century champion of the personal liberties of Englishmen as he witnessed a group of prisoners being marched to the scene of execution. So thought many jurists of the American and English courts prior to the adoption of enabling legislation whereby great masses of humanity have been saved, by the medium of probation, from destruction at the hands of the sovereignty in its anxiety to mete out punishment to offenders.

Probation came in response to a demand by society for a means of saving offenders whose potential for making a contribution to society was, by those administering justice, thought worthy of salvage. The first legislative provision for probation came in England in 1887 by the Parliamentary enactment of the First Offenders Act.[1] So profitable was the function of this legislation that Parliament adopted the Probation of Offenders Act in 1907,[2] thus extending to the judiciary a wider prerogative in exercising the power of probation.

American jurists early recognized the need for probation. Many courts regarded this probationary power as being a part of the common law and inherent to the judiciary. However, a majority of courts, though recognizing the need for probation, felt that it was not an inherent power of the judiciary and that it could only be granted to them by legislative action. An early case in which this question was discussed is *Ex parte United States*.[3] There the Supreme Court of the United States reviewed the action of a trial court which had invoked the power of probation under the apparent theory that it was a facet of the common law inherent to the judiciary. Mr. Chief Justice White wrote the opinion of the Court which rejected the theory of the trial court. Both in the language of the opinion and in the mandate of the Court, the Chief Justice jealously guarded a more limited concept of the inherent power belonging to the court, because in the concluding paragraph of the opinion, wherein the power of probation apart from legislative grant was denied, the Court refused to issue its writ of revocation until the end of the then current term of court. This was for the express purpose of allowing sufficient time for executive clemency, "or such other action as may be required to meet the situation."[4]

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[1] 50 & 50 Victoria, c. (1887).

[2] 7 Edward 7, c. 17 (1907).

[3] 242 U. S. 27 (1916).

[4] Id. at 52.

The opinion of the Court recognized the need for probation legislation in the following significant language:

> ". . . so far as wrong resulting from an attempt to do away with the consequence of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject by probation legislation, or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress, whose legislative power on the subject is, in the very nature of things, adequately complete."[5]

It was more than eight years after the use of this language by the Chief Justice that Congress enacted the Probation Act of March 4 , 1925.[6] It is generally conceded that the Probation Act, both in its original and amended forms,[7] has met with approval, and that it has been an effective means of restoring great numbers of human beings to a useful and productive life. It is significant that no sovereign body which has given existence and fair opportunity of success to a probation law has rescinded it.

The road toward the enactment of a probation law in Mississippi has been neither short nor easy. Mississippi was the last state to enact this type of legislation.

Prior to 1914 trial courts in Mississippi had absolutely no discretion regarding probation, and the imposition of sentence upon all persons convicted of any crime or misdemeanor was mandatory. By the Act of March 14, 1914,[8] the legislature authorized the circuit courts, in their discretion, to suspend the execution of sentence, or any part thereof, and on such terms as the court saw fit to impose, in any misdemeanor case. In 1950 this power was extended to include the county courts.[9] In *Freeman v. State,*[10] the Supreme Court of Mississippi held that the judgement of a county court suspending sentence in a misdemeanor case prior to the enactment of this amendment was void. In effect this decision held strictly to the theory that probation could have existed only through legislative enactment.

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[5]Ibid.
[6]43 Stat. 1259, c. 521 (1925).
[7]18 U. S. C. A. §§ 3651-56 (1952).
[8]Miss. Laws 1914, c. 207.
[9]Miss. Laws 1950, c. 347.
[10]220 Miss. 777, 72 So.2d 139 (1954).

A review of the legislation on to which the power of judicial probation was finally grafted is interesting. The Constitution of Mississippi gives to the governor the power to grant reprieves, pardons, and remittiturs, under prescribed conditions and limitations.[11] Not until 1942 was there provided any administrative body to aid the chief executive in the exercise of this demanding responsibility.[12] By the Act of March 20, 1942, a State Board of Pardons was created and from this legislative seed eventually grew the idea of parole. On to this system of parole was grafted that of probation.

In 1944, the legislature enacted the Parole Act, which provided for the parole of prisoners and also created the necessary administrative machinery for effectuating the provisions of the act.[13] A Parole Board was created and other machinery was implemented to the end that deserving prisoners might be made the recipients of this act. In 1950, the legislature revised the Parole Act[14] which resulted in several improvements of the 1944 act.

In 1956, by amendment of the Parole Act of 1950, the legislature enacted Mississippi's first probation law. It became effective July 1, 1956. By its own provision this act is identified as the "Probation and Parole Act."[15]

This act creates the State Probation and Parole Board which is comprised of three members, one from each of the supreme court districts. The appointments to the board are for a term of four years, and are to be made by the governor and are subject to confirmation by the senate. The chairman of the board is designated by the governor.

The board is authorized to appoint an administrative assistant, who, in turn, and with board approval, shall appoint "a sufficient number of probation and parole officers and other employees required to administer the provisions of the act."[16] The total number of employees of the board is limited to ten individuals. Probation and parole officers are to be selected from applicants who have taken a competitive examination prepared and conducted by the board. The administrative assistant is the executive officer of the board.

For the purpose of assigning probation and parole officers, the administrative assistant, subject to board approval, divides the state into districts and designates the probation and parole officers who are to serve in the various districts and the courts therein. The circuit and county court judges are given the power to request the board to transfer

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[11]Miss. Const. § 124 (1890).
[12]Miss. Laws 1942, c. 283.
[13]Miss. Laws 1944, c. 344, repealing Miss. Laws 1942, c. 283.
[14]Miss. Laws 1950, c. 524.
[15]Miss. Code Ann. § 4004-27 (1942).
[16]Miss. Code Ann. § 4004-05 (1942).

or remove from their circuit any probation or parole officer assigned to them.

The probation and parole officers are vested with the powers of police officers which may be necessary and incidental to the performance of their duties. They are required to investigate all cases referred to them and furnish to each person released to them a written statement of the conditions of their probation or parole, and are to instruct the probationer or parolee regarding these conditions. These officers are charged with the responsibility of keeping informed as to the condition and conduct of persons assigned to them, and they are required to keep detailed records of this information. It is necessary for these officers to post bond in the sum of $2,000.00 conditioned upon the faithful performance of their duties.

The act declares it to be the intent of the legislature that the case load of each officer "not exceed the number of cases that may adequately be handled and that no probation or parole officer shall be required by the Board to supervise such an excessive case load as would prevent him from being available to the courts for investigation and supervision of probation cases."[17]

When, in the opinion of any circuit or county court vested with original jurisdiction over criminal actions, the end of justice and the best interest of the public and the offender will be best served, the court, in term time or in vacation, is vested with authority, after conviction or plea of guilty, and except in cases where the maximum penalty is death or life imprisonment, and except where the offender has previously been convicted of a felony, to suspend the imposition of the execution of sentence and to place the offender on probation. After the offender has commenced service of his sentence in the place of confinement, the trial court is without jurisdiction to place the offender on probation.

The court is vested with power to prescribe the terms and conditions of probation, and is vested with authority to alter or modify these conditions. It may include among them a number of conditions incorporated in the statute. The prerogative of the court as to the conditions of probation is not, however, limited to those suggested and set forth in the act. These suggested conditions of probation are:[18]

(a) No offense shall be committed against the laws of any state of the United States, or against the United States.
(b) The probationer shall avoid injurious or vicious habits.
(c) He shall avoid persons or places of disrepute or of harmful character.

[17]Miss. Code Ann. § 4004-09 (1942).
[18]Miss. Code Ann. § 4004-24 (1942).

(d) He shall report to the probation and parole officer in keeping with directions given to him by the officer, or by the court.

(e) He shall permit the probation and parole officer to visit him at home or elsewhere.

(f) He shall obtain and faithfully pursue suitable employment insofar as is possible.

(g) He shall remain within prescribed area. If fined, he shall pay his fine in one or in several installments.

(h) He shall support his dependents.

The period of probation shall not exceed five years. If the probationer violates the conditions of his probation, the court may issue a warrant for his arrest, and any probation and parole officer, or his deputy, if an officer with power of arrest, may arrest a probationer with or without a warrant by delivering to him a written statement setting forth that in the opinion of the probation and parole officer conditions of probation have been violated. Such written statement, when delivered with the offender, is specifically made a sufficient warrant for the detention of the person whose probation is revoked. When such an arrest is made by the probation and parole officer, it becomes the duty of the officer to notify the court of such arrest and detention, and to submit to the court a written report setting forth the manner in which the offender has violated the conditions of his probation. The court shall thereupon require the offender to appear before it, and after hearing and determining the cause, may continue or revoke the probation or suspended sentence, and may cause any sentence imposed to be executed, or may impose sentence which might have been imposed at the time of conviction.

The act makes provision for the trial judge having original jurisdiction to transfer to another court at the situs of the breach of parole the responsibility of hearing and determining the question of cause for revocation of probation. The act further provides that a probationer who removes beyond the territorial limits of the State of Mississippi without express permission of the court so to do, is deemed to be a fugitive from justice and is subject to the processes of extradition. In the event the revocation of probation is necessitated, the period during which the offender has been on probation shall not count toward the execution of any sentence imposed.

The act allows for change of residence by probationers, and makes the power of granting requests for change of residence discretionary with the court.

Provision is made that upon completion of probation, the proba-

tion officer shall make a written report of the record of the probationer to the Probation and Parole Board. It becomes the duty of the board to present a copy of the report to the governor, and the governor, in his discretion, at any time thereafter may, by executive order, restore to the individual any civil rights that may have been lost by reason of his conviction in the court of original jurisdiction.

Sufficient time has not transpired since the adoption of the Probation and Parole Act to assimulate statistical data as to the effective use being made of this new legislation. The act gives the trial judge ample authority to effectuate the ambition of society to save first offenders from the ravages and ruin that so often results from confinement with the hardened criminal elements. It is perhaps the most progressive step yet taken by the legislature toward salvaging human life from an inclination toward crime and destruction and giving to it that help, guidance, caution and encouragement that so often inspires the best that is in men, and results in their being an asset to society instead of a blight upon it.

ADMINISTRATIVE PROCEDURE BEFORE THE STATE OIL AND GAS BOARD

*Matthew Harper, Jr.**

Although the Constitution of 1890 divides the powers of the government of the State of Mississippi into three distinct departments—legislative, judicial, and executive – the legislature, through the creation of boards to administer various statutes, has, in effect, created a fourth department – administrative. The importance of administrative procedures before the Oil and Gas Board, which board, as it now exists, was the authority of the courts to review acts and orders of such agency.

The scope of this article will be confined to the administrative procedures before the Oil and Gas Board, which board as it now exists was created by the legislature in 1948.[1] The Supreme Court has announced the rule that when an appeal is from either a general rule and regulation or from an exception granted thereto, the court to which the appeal is taken shall inquire only into whether the same is reasonable and proper according to the facts discovered before the board. To put it another way, the Court has said that the appellate court shall inquire only into whether or not the decision of the board is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the board, or violates any constitutional right of the complaining party.[2]

Our Court has said that it is not for the Supreme Court to substitute its opinion for the opinion of the Oil and Gas Board where the board has reached its decision on conflicting evidence and where its conclusions are supported by substantial evidence.[3] In the cited case it is interesting to observe that the substantial evidence referred to consisted of the expert testimony of one geologist as opposed to the testimony of two geologists and one reservoir engineer, the board having accepted the testimony of the one geologist as against the other three witnesses.

Nor can the Supreme Court *modify* a board order. In *Superior Oil Co. v. Griffith*[4] the Court on suggestion of error withdrew its original opinion wherein it had modified a unitization order erroneously including in the unit a twenty acre tract, and affirmed and remanded the cause without prejudice for further proceeding before the Oil and Gas Board. The Court held that it was bound by the same limitation placed upon the

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1Miss. Laws 1948, ch. 256.

2California Co. v. State Oil & Gas Board, 200 Miss. 824, 27 So.2d 542, 28 So.2d 120 (1946).

3Ohio Oil Co. v. Porter, 82 So.2d 636 (Miss. 1955).

4214 Miss. 891, 60 So.2d 505 (1952).

circuit courts,[5] and that it must affirm an order or reverse it for further proceedings, but cannot modify it.

As a limitation upon the authority of the Oil and Gas Board, in the case of *Hutchins v. Humble Oil & Refining Company*,[6] the Court has held that the effect of a compulsory pooling or integration order upon the property rights of the parties in interest cannot be adjudicated before the board. As a matter of fact, the Oil and Gas Board has been very careful in each and every order entered involving compulsory pooling or integration to refrain from adjudicating the title of the owners of lands or leases.

The Court has upheld the constitutionality of that portion of the Oil and Gas Conservation Law which authorizes the board to integrate the interests of persons owing drilling rights in two or more separately owned tracts of land embraced in an established drilling unit;[7] this is one of the more drastic and far-reaching provisions of the act. The conclusion was reached in the case of *Superior Oil Company v. Foote*[8] on the ground that the state may, under its police power, enact regulatory laws and prescribe methods of extracting oil and gas for the purpose of conservation, the efficient utilization of reservoir energy, and the protection of the correlative rights of all owners in a common source of supply, conditioned that such statute cannot be arbitrary or unreasonable and that the regulations must have a direct substantial and reasonable relation to the statutory purposes. In this case the Court also said that compulsory pooling may be ordered by the board after a well has been drilled as well as prior thereto, where such pooling is necessary to prevent the drilling of unnecessary wells.

Pursuant to the authority contained in section 7 of the Oil and Gas Conservation Act[9] the present rules of order of procedure in hearings before the board were adopted under date of November 19, 1951; only after public hearings and numerous conferences, hearings, and discussions with the oil and gas industry. The rules as adopted will be discussed in sequence.

RULE 1. "All hearings before the Board shall be open to the public. Hearings shall be called by the Board for the purpose of taking any action in respect to any matter within its jurisdiction upon its own motion or upon the request or application of any interested party. Applications or requests for hearings (except as otherwise provided herein) shall be written and may be in the form of a letter, shall be brief and concise, shall state in general terms the matter upon which action of the Board is de-

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[5]Miss. Code Ann. § 6132-24 (1942).
[6]59 So.2d 103 (Miss. 1952).
[7]Miss. Code Ann. § 6132-22 (1942).
[8]214 Miss. 857, 59 So.2d 85 (1952).
[9]Miss. Code Ann. §§ 6132-11 - 6132-17 (1942).

sired, the interest of the applicant or person making the request, the relief sought, and the reasons therefor."

Section 7 (b) of the Act[10] authorizes the promulgation of the foregoing rule. In this connection, although the rule states that applications or requests for hearings may be in the form of a letter, the usual practice has been for applicants to file a petition in the nature of an ex parte petition before a chancery court.

RULE 2. "The Secretary of the Board shall maintain a Docket Book, and all applications or requests for hearings and all hearings called on the motion of the Board shall be docketed and given a docket number, and a file carrying such number shall be opened by the Secretary of the Board. All applications for hearing, a copy of the notice of hearing, together with proof of its publication, the originals of all instruments, documents, plats and other data filed with the Board in connection with the hearing or the subject matter thereof, a transcript of all evidence taken at the hearing, the originals or copies of all correspondence with the Board concerning such hearing or the subject matter thereof shall be stamped with the docket number of the hearing and placed and kept in the file carrying such number. The Docket Book and all files pertaining to hearings shall be open to the public at all reasonable times but shall not be removed from the custody of the Board or its employees. Copies of all such instruments, documents, plats, other data, and correspondence shall be furnished to any interested party upon payment of the cost of making such copies. All notices of hearing shall refer to the docket number thereof. Copies of applications for hearings shall be furnished by the Secretary of the Board to any person upon request."

The authority for the adoption of this rule likewise comes under section 7 (e) of the Act.[11]

RULE 3. "All hearings shall be held in Jackson, Mississippi, unless otherwise ordered by the Board."

Under section 2 (b) of the Oil and Gas Act[12] the Board is required to meet and hold hearings at such time and places as may be found by the Board to be necessary to carry out its duties.

RULE 4. "Upon receipt of a proper request or application for hearing, the Board shall call a hearing within thirty (30) days, and after such hearing and with all convenient speed, and in any event within thirty (30) days after the conclusion of the hearing, shall take action with regard to the subject matter thereof."

The statutory authority for the adoption of this rule is section 7 (f) of

[10]Miss. Code Ann. § 6132-12 (1942).
[11]Miss. Code Ann. § 6132-15 (1942).
[12]Miss. Code Ann. § 6132-12 (1942).

the Oil and Gas Act.[13] Although this section requires that the board shall take action with regard to the subject matter within thirty days after conclusion of such hearing, the Supreme Court has construed this section[14] as not meaning that the final order must be entered within thirty days to be valid, but that the proceedings shall be followed up expeditiously beginning within that time, giving the board a reasonable time to determine what it will do.

RULE 5. "Notice of all hearings of the Board shall be given by publishing notice thereof at least ten (10) days before the date of hearing in a newspaper published daily in Jackson, Mississippi, of general circulation in the state, and in a newspaper of general circulation in the county or counties in which the pools involved are located; provided that notice of a hearing on a statewide rule or order affecting all pools in the state shall be published twice in a newspaper published daily in Jackson, Mississippi, of general circulation in the state, the first publication appearing at least ten (10) days before the date of hearing, and the second publication appearing at least five (5) days before the hearing, and no other publication shall be necessary for such hearing.

"The Secretary of the Board shall maintain a general mailing list and shall place thereon the names and addresses of all persons, firms, or corporations who make request in writing to be included on such list. Each person, firm and corporation on such mailing list shall be mailed, at the address listed, a copy of all notices and orders issued by the Board. The Secretary of the Board shall maintain a mailing list for each field in the state and shall place on each list the names and addresses of all persons, firms or corporations who make request in writing to be included thereon. Each person included on the mailing list of any field shall be mailed at the address listed a copy of all notices and orders issued by the Board as to such field. The failure to mail a copy of a notice to any such person, firm or corporation shall not affect the validity of any hearing held pursuant to the notice published in accordance with the preceding paragraph or any rule, regulation or order issued pursuant to such hearing."

The authority for the enactment of this rule is section 7 (b) of the Act[15] and the constitutionality of the notice provisions on the application was attacked as being violative of article 3, section 14 of the Constitution of 1890 and the fourteenth amendment to the Constitution of the United States. The circuit court had held such section to be unconstitutional in that the notice attempted to be given thereof was insufficient. However,

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[13]Miss. Code Ann. § 6132-16 (1942).

[14]Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85 (1952); Superior Oil Co. v. Berry, 59 So.2d 689 (Miss. 1952).

[15]Miss. Code Ann. § 6132-12 (1942).

the Supreme Court in the case of *Ohio Oil Company v. Porter*[16] refused to consider the constitutionality of the section in view of the fact that the parties to the appeal had appeared before the board in the hearing under review and were, therefore, not in a position to complain that they were not afforded ample notice of the hearing. The Court, of course, decided this question on the proposition that the only purpose that notice would serve has been accomplished when a party appears and participates in a hearing.

RULE 6. "Notices of all hearings by the Board shall state the time and place of the hearing, the name of the party requesting the hearing, the nature thereof, the relief sought and the docket number of the same. All persons requesting a hearing shall prepare the notice therefor and submit the same to the Supervisor for his signature. It shall be the duty of the Supervisor to sign and return the notice to the person requesting said hearing and said person shall cause, at his or its expense, said notice to be published in the manner and for the length of time as prescribed by law and the rules and regulations of the Board. Upon the completion of the publication, the person requesting the hearing shall secure a legal proof of said publication and cause it to be filed with the Supervisor prior to the hearing.

"Said notice may be in the following form:

PUBLIC NOTICE

"To all owners and persons interested in the following described land:

(Here describe land by legal description)

take notice that (insert name of party or parties requesting hearing) has filed petition (or application) with the State Oil and Gas Board of Mississippi under Docket Number..... requesting that (Here state nature of hearing. Example: The above described land be established by the Board as a gas drilling unit in Maxie Field; to approve a gas well location thereon and to unitize all royalty and mineral interest in said land).

"That said matter will be heard by said Board at ..... o'clock .....M. on the ..... day of .....A.D., 19..... in the Second Floor Auditorium of the Woolfolk State Office Building, Jackson, Mississippi, at which time and place you may appear and contest said matter. (Signed by State Oil and Gas Board of Mississippi by Supervisor and Secretary)."

Section 7 (b) of the Oil and Gas Conservation Act[17] empowers the State Oil and Gas Board to prescribe form of notice of hearing.

RULE 7. "No notice by personal service shall be necessary except

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[16]82 So.2d 636 (Miss. 1955).
[17]Miss. Code Ann. § 6132-12 (1942).

in those instances where same is required by the Board by special order entered on its minutes. If the Board should require notice by personal service, written notice may be issued by any member of the Board or by the State Oil and Gas Supervisor and service thereof shall be made in accordance with the provisions of Section 7, subsection (d) of H.B. 80, General Acts of the Regular Legislative Session, 1948."[18]

RULE 8. "After notice of a hearing is once given, the hearing may be continued to another day and from day to day by order of the Board entered on the day fixed for the hearing."

Section 7 (f) of the Act[19] authorizes the adoption of such rule which has been upheld in the case of *Superior Oil Company v. Foote.*

RULE 9. "Emergency action may be taken by the Board without notice and hearing in the event the Board finds immediate action is necessary in order to prevent waste, to prevent irreparable injury or for some other cause, but each emergency rule, regulation and order shall provide that it will remain in force no longer than forty-five (45) days from its effective date. Immediately upon entering an emergency rule, regulation or order the Board shall call a hearing on the subject matter thereof, and such hearing shall be held prior to the expiration of the emergency rule, regulation or order."

This rule was promulgated in accordance with the provisions of section 7 (c) of the Act.[20]

RULE 10. "All interested parties shall have the right to be heard at all hearings and to present witnesses and other evidence whether or not represented by legal counsel or technical assistance. The Board may require any protest made to be reduced to writing and filed with the Board."

RULE 11. "In any proceeding before the Board subpoenas may be issued requiring the attendance of witnesses and the production of books, papers and records material to the matters lawfully before the Board at the designated place of hearing."

This rule was promulgated in accordance with the provisions of section 8 (b) of the Oil and Gas Act.[21]

RULE 12. "The hearings shall be opened with the reading of the notice or notices. The request for hearing, the notice or notices thereof and proof of the due publication of the notice or notices of the hearing shall be made a part of the record of the hearing."

RULE 13. "(a) All witnesses shall be required to testify under oath, administered by a member of the Board or the Secretary thereof, to tell the truth, the whole truth and nothing but the truth, and all witnesses

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[18]Miss. Code Ann. § 6132-14 (1942).
[19]Miss. Code Ann. § 6132-16 (1942).
[20]Miss. Code Ann. § 6132-13 (1942).
[21]Miss Code Ann. § 6132-19 (1942).

shall be subject to direct and cross-examination by any member of the Board or by any party or parties interested in the hearing or by their representatives.

"(b) Except that in non-contested matters or in contested matters where those parties who appear in person at the hearing agree thereto, sworn affidavits may be received in evidence. The Board reserves the right to reject any and all such affidavits and to require the affiant to appear in person.

"(c) The materiality, relevancy and competency of any testimony shall be subject to challenge by any party to the hearing or by any member of the Board. When so interposed, such objections shall be acted upon by the Chairman or by the Acting Chairman, his ruling thereon being subject to change by a majority vote of the Board Members then sitting.

"(d) All persons presenting exhibits shall file a total of eight copies with the reporter. All suggested forms of order shall be presented in quadruplicate."

These rules are adopted under the general statute which appears as section 7 (a) of the Act.[22]

RULE 14. "The Board shall from time to time by order entered on its minutes appoint a competent shorthand reporter. All hearings of the Board shall be recorded by a reporter appointed by the Board and sworn by the Board faithfully to discharge his duties in accordance with law and the direction of the Board. The reporter shall only transcribe those hearings wherein the Board orders same transcribed. When such order has been entered, said transcript shall be available for inspection at the office of the Board in Jackson, Mississippi, and transcripts shall be available for purchase by interested parties from the reporter at rates prescribed for transcripts of evidence in circuit court proceedings in Mississippi, whether ordered transcribed by the Board or not."

The authority for the adoption of such rule is prescribed in section 7 (a) of the Oil and Gas Act.[23]

RULE 15. "Regular monthly meetings shall be held by the Board on the third Wednesday of each month. Where circumstances permit, the Board, after sounding the docket, shall first call up and dispose of all non-contested matters and motions for continuance."

The requirement for the fixing of time of meeting is set forth in section 2 (b) of the Oil and Gas Act.[24]

In addition to the foregoing, the board adopted the general rule that these rules are in addition to and supplement the provisions of the

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22Miss. Code Ann. § 6132-11 (1942).
23Miss. Code Ann. § 6132-11 (1942).
24Miss. Code Ann. § 6132-02 (1942).

Oil and Gas Act which may be applicable to hearings before the board, with the proviso that such rules of order and procedure may be repealed, amended or supplemented after notice and hearing.

While the foregoing material has been to a large extent devoted to a discussion of the rules of order and procedure involving public hearings of the Board, the Board is vested with broad powers to enforce the provisions of the Oil and Gas Act from an administrative standpoint. The Board has conducted hearings concerning violations or alleged violations of the rules and regulations of said Board and has caused operators to produce their books and records and other evidence pertaining to such alleged violations. As a result of such investigations made from time to time by and on behalf of the Board, civil suits have been filed in accordance with section 15 of the Act[25] under the penalty provisions of the Act and substantial recoveries have been made. So far as the writer of this article knows, no criminal proceedings have yet been instituted against any operator although it has become necessary in one instance that a mandatory injunction be obtained to require an operator to properly plug an abandoned well.

The importance of a full and complete hearing and presentation of all relevant facts to the Board certainly cannot be minimized in view of the pronouncement by the Supreme Court that it cannot substitute its opinion for the opinion of the Oil and Gas Board where the board has reached its decision on conflicting evidence and where its conclusions are supported by substantial evidence.

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[25]Miss. Code Ann. § 6132-28 (1942).

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STUDENT COMMENTS

IN PERSONAM JURISDICTION OVER NON-RESIDENTS

Introduction

The Mississippi statute,[1] which provides for substituted service of process on non-residents, is extremely broad, sweeping, all inclusive. It provides that, "Any, non-resident person, firm, partnership, general or limited, or any corporation" who shall do "any business or perform any character of work or service in this state" may be served. This would certainly seem to indicate that the legislature has declared it to be the public policy of this state to extend protection to its resident citizens against wrongful acts of non-residents to the furthest limits possibly consistent with the requirements of our state and federal constitutions. It is the purpose of this comment to examine the decisions of the Supreme Court of the United States, together with the decisions of the state courts and the lower federal courts in an attempt to define this limit. Thus, this article is limited to a discussion of substantive due process insofar as it requires a sufficient basis for asserting jurisdiction over the person.

I. Historical Trend

Under *Pennoyer v. Neff*,[2] decided by the Supreme Court of the United States in 1878, jurisdiction could only be acquired by "consent" or "presence". Jurisdiction, it was said, was based upon a court's physical power over a non-resident. But even under the strict "physical power" doctrine of *Pennoyer v. Neff*, the question of substituted service was left open for later determination.[3]

The first deviation from the physical power doctrine, as applied to proceedings in personam, arose in cases involving foreign corporations. But rather than overrule *Pennoyer v. Neff*, or specifically create an exception to it, the Supreme Court of the United States chose to create fictions in order to bring its holding within the rule of *Pennoyer v. Neff*. Since personal jurisdiction, under physical power, could only be acquired by consent or presence; the Court created the "doing business" test by an application of what has become known as the "implied consent" and "presence" fictions.[4] A state has the power, reasoned the Court, to arbitrarily exclude a foreign corporation from doing business in the state (power of exclusion theory); and having that power, it also has the power to set up conditions for its admission into the state, one of which is to compel it to submit to the jurisdiction of the courts of the state. In other cases, the court reasoned that the doing of business by

[1] Miss. Code Ann. § 1437-38 (1942). For an excellent treatment of the problem soon after this section was passed, see 13 Miss. L. J. 559 (1941).

[2] 95 U.S. 714 (1878).

[3] Id. at 735.

[4] As to the "implied consent" fiction see St. Clair v. Cox, 106 U.S. 350 (1882); Old Wayne Life Ass'n. v. McDonough, 204 U.S. 8 (1907). As to the "presence" fiction see Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530 (1907); International Harvester v. Kentucky, 234 U.S. 579 (1914).

a foreign corporation indicated that it was present within the state for purposes of personal jurisdiction.

The weaknessess of these ficitions are very ably pointed out in a leading article by Professor Foster[5] as follows:

> "In some cases it was suggested that by doing business the foreign corporation implied consent to be subjected to personal jurisdiction in the state, but this consent was more fictional than real whenever the corporation challenged a court's jurisdiction over its person. In other cases, it was said that the business done was evidence of a corporate 'presence' in the state; but there was no 'presence' in any real sense in those cases in which the corporation had withdrawn from business prior to service upon a state official whose appointment had not been 'consented to' by the foreign corporation."[6]

Although these fictions were clearly artificial, they served their purpose, which was to extend the personal jurisdiction of the state courts over non-residents and at the same time preserve the rule of *Pennoyer v. Neff*. The courts adopted various standards which were used in determining whether or not a corporation was "doing business", among which was the requirement that the transactions conducted within the state be systematic and continuous. The test was strictly a quantitative one. Since these standards have been adequately treated in other works,[7] they will not be examined here.

While jurisdiction over foreign corporations was being extended by the "doing business" test, a somewhat different approach was being applied in cases involving non-resident individuals.[8] In the 1918 case of *Flexner v. Farson*,[9] Mr. Justice Holmes, who delivered the opinion of the court, reasoned a difference between cases involving foreign corporations and cases involving non-resident individuals. The theory in that case was that a state could prevent a corporation from doing business within the state (power of exclusion theory) but could not prevent an individual from so transacting business regardless whether or not he made himself amenable to its processes. The decision in this case is considerably weakened by the fact that service of process was attempted on a person who was no longer the agent of the defendant individual.[10]

The first deviation from "physical power" in regard to individuals was in the case of *Hess v. Pawloski*,[11] decided by the Supreme Court of

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[5]"Personal Jurisdiction Based on Local Causes of Action," 1956 Wis. L. Rev. 522 (1956).

[6]Id. at 535.

[7]See Scott, "Jurisdiction Over Nonresidents Doing Business Within a State," 32 Harv. L. Rev. 871 (1919).

[8]Since a firm, partnership, and an unincorporated association is treated as an individual, all discussion in regard to an individual applies with equal force to these groups.

[9]248 U.S. 289, (1918).

[10]See Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, (1935), where the Supreme Court later explained the results on the ground that the person upon whom process had been served was no longer working for the defendant.

[11]274 U.S. 352 (1927).

the United States in 1927. This case involved an automobile accident, and the court reasoned that if the non-resident intends to engage in a *dangerous activity,* the non-resident can be excluded from the state under the police power. Having this power to exclude, the state has power to impose reasonable conditions upon its admittance. By carrying on the dangerous activity, the non-resident is presumed to have consented to the jurisdiction of the state. Again, in the case of *Henry L. Doherty & Co. v. Goodman,*[12] the Court held that if the activity engaged in is of such a dangerous nature as to subject the non-resident to regulation under the police power, the state may acquire personal jurisdiction over him. This case involved the selling of corporate securities within the state by a non-resident individual. The decision was justified on the theory that the sale of corporate securities in Iowa was subject to the police power of the state.

Prior to 1945 we find that the "physical power" doctrine of *Pennoyer v. Neff* was still being adhered to, but due to the creation of artificial fictions, its legal effect had been somewhat limited:

1. As to foreign corporations, personal jurisdiction had been extended to corporations "doing business" within the state by the application of the "implied consent" and "presence" fictions.
2. As to non-resident individuals, personal jurisdictions had been extended *only* to those who engaged in activity subject to regulation under the police power of the state.

II. State Police Power

From the *Hess* and *Doherty* cases there developed considerable authority which allowed a state to acquire jurisdiction over a non-resident individual if the activity conducted within the state is such that it be subject to regulation under the police power of the state.

It is clear that where the non-resident engages in an activity specifically regulated by statute under the police power, *and* his activity falls within the purview of the substituted service statute, valid process may issue. This is illustrated by the case of *Condon v. Snipes,*[13] decided by the Supreme Court of Mississippi in 1948. In that case the defendant was a non-resident individual engaged in the business of termite control and was served with process in accordance with our substituted service of process statute. The court held process valid, basing its decision upon the fact that the business of termite control was specifically regulated by statute in Mississippi under the police power.

But the absence of a specific statute regulating the particular activity is not conclusive of its not being subject to the police power. In *Sugg v. Hendrix,*[14] defendant was engaged in levee construction in Mississippi and in performing such work sent heavy machinery into the state, and plaintiff was injured by one of these machines. There was no statute which specifically regulated levee construction work, but the court held the substituted service of process to be valid, and based its

12294 U.S. 623 (1935).
13205 Miss. 306, 38 So.2d 752 (1948).
14142 F.2d 740 (5th Cir. 1944).

holdings upon the fact that the activity engaged in by the defendant was subject to regulations under the police power. Cases of similar import are *Davis v. Nugent*,[15] where the activity engaged in was the wholesale lumber business; *Gullioz v. Kencannon*,[16] where the activity engaged in was the clearing of a dam area; *McDaniel v. Textile Workers Union of America*,[17] where the activity engaged in was maintaining picket lines by a labor union. The court had the following to say in the *McDaniel* case:

> "Since it is not true that selling stocks and bonds is any more dangerous in fact than many other types of business transactions, it would seem that we have really recognized the doing of an act as an out and out basis of personal jurisdiction . . . .
> "[T]he trend of modern decisions is to sustain the power of a state to provide for bringing in a non-resident individual who is doing business in the state of the forum by something other than personal service of process upon him within the state.
> "We think a state has a right in the exercise of the police power to protect its citizens against the inconveniences, often amounting to complete denial of redress, of going to a foreign state to sue for a wrong committed by one doing business within the state and arising out of business done within the state."[18]

It is apparent from the foregoing discussion that the state's police power includes the convenience and economic welfare of the citizens of the state. Certainly the state is interested and justified in protecting its citizens from all kinds of tortious acts by non-residents. Thus, the exercise of the state's police power would appear to be a sweeping ground for in personam jurisdiction over non-residents.

III. The International Shoe Case

A. Doctrine

In 1945 came *International Shoe Company v. State of Washington*[19] which "brought about a reshuffling of our concept of due process."[20] The defendant was a foreign corporation engaged in the sale of shoes and had eleven to thirteen salesmen in the state of Washington for that purpose. It had no office or property and no contracts were made therein. The salesmen merely solicited orders for shoes, which were accepted and shipped from outside the state. Their activities were limited to exhibiting samples and soliciting orders. The state of Washington made an assessment for unemployment compensation against the defendant and upon his refusal to pay brought suit for the amount of the assessment. Service of process was made upon one of the salesmen in accordance with the state statute, the validity of which was the question before

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15 90 F. Supp. 522 (S.D. Miss. 1950).
16 213 Ark. 1010, 214 S.W.2d 212 (1948).
17 36 Tenn. App. 236, 254 S.W.2d 1 (1952).
18 254 S.W.2d at 5-6.
19 326 U.S. 310 (1945).
20 Stanton v. Duncan, Brief of Appellant, p. 20; final Moot Court argument, University of Mississippi, May 7, 1957.

the court. Mr. Justice Stone, speaking for the court, said:

> "Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' . . . It is evident that the criteria . . . cannot be simply mechanical or quantitative . . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations . . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enfore them can, in most instances, hardly be said to be undue."[21]

The Court specifically denounced the old "consent" and "presence" fictions and completely abandoned the "doing business" test, substituting therefor a completely new and different criterion. The old "quantitative" test was replaced by a "qualitative test". It is submitted that the effect of *International Shoe* is to completely abolish the "physical power" doctrine, the "power of exclusion" theory, and the "doing business" test. The problem of inconvenience raised by this case will be discussed later.

An interpretation of the *International Shoe* case requires an answer to two principal questions:

1. Does the doctrine announced in the *International Shoe* case apply to non-resident individuals?
2. Is a *single transaction* by a non-resident within the state sufficient to meet the doctrine of *International Shoe*?

B. *The International Shoe Doctrine and Individuals*

It should be remembered that prior to *International Shoe* jurisdiction over non-resident *individuals* could *only* be acquired if the non-resident engaged in activity which was subject to regulation under the police power. If the doctrine of *International Shoe* applies to individuals, then the state may acquire in personam jurisdiction regardless of whether or not the activity engaged in is subject to regulation under police power.

A close reading of *International Shoe* makes it apparent that its principles were intended to apply to individuals, and the decisions sub-

[21] 326 U.S. at 316, 319.

sequent to *International Shoe* so hold.[22] The following quote from a recent leading article[23] is indicative of the treatment given this problem by modern legal writers:[24]

> "While the *International Shoe* case strictly involved a corporation, the whole tenor and philosophy of the opinion leaves no doubt of intent that its principles apply equally to non-resident individuals. The language concerning responsibility for obligations as a corrollary to the acceptance of benefits represents exactly the reasoning which erased the power concept with regard to a state's jurisdiction in personam over its citizens and domestic corporations."[25]

It would thus appear that the effect of *International Shoe* is to place individuals and corporations on an equal footing, notwithstanding Mr. Justice Holmes and *Flexner v. Farson.*

The Supreme Court of Mississippi in the *Condon* case pretermitted the question of the validity of substituted service on non-resident individuals in cases where they are not subject to the police power of the state. In 1951 the Court answered this question in *Davis-Wood Lumber Co. v. Ladner*[26] as follows:

> "In *Condon v. Snipes* . . . this Court pretermitted the question of 'the validity of the last mentioned statute (§ 1437) in cases where the defendant is not subject to state regulation.' That question is now presented, and we hold that where the action arises out of activities of the non-resident in the state, Sec. 1437 et seq. are applicable. This is in accord with the terms of the statute and principle of *Condon v. Snipes, Hess v. Pawloski,* and the *International Shoe* and *Travelers Health Association* cases. Any distinction between jurisdiction founded upon doing business in a state which involves danger to life or property or state regulation, and on the other hand contractual obligations arising out of such business, is artificial and not consistent with the principle or policy of the statutes and foregoing decisions . . . ."[27]

Though the latter part of the above quote is not too clear, it is submitted that the effect of this case is to render it unnecessary that the activity engaged in be subject to regulation under the police power. Thus, even though the *Davis-Wood* case involved a corporation, the case speci-

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[22]See Shutt v. Commercial Travelers Mutual Accident Ass'n. of America, 229 F.2d 158 (2d Cir. 1956); State ex rel. Weber et ux v. Register, 67 So.2d 619 (Fla. 1953); Wein v. Crockett, 195 P.2d 222 (Utah 1948).

[23]Cleary & Seder, "Extended Jurisdictional Bases for the Illinois Courts." 50 Nw. U. L. Rev. 599 (1955).

[24]For language of similar import see also the following articles by modern legal writers: Foster, "Personal Jurisdiction Based on Local Causes of Action," 1956 Wis. L. Rev. 522, 545, 581 (1956); Note, 44 Cal. L. Rev. 737, 745 (1956); Note, 54 Mich. L. Rev. 1026, 1027 (1956); Note, 50 Nw. U. L. Rev. 599, 603 (1955); Note, 12 N.Y.U. Intra. L. Rev. 127, 141, (1957); Note, 22 U. Chi. L. Rev. 679, 684 (1955).

[25]Note 24 supra at 603.

[26]210 Miss. 863, 50 So.2d 615 (1951).

[27]Id. at 884, 50 So.2d at 624.

fically answered the pretermitted question in the *Condon* case, which involved an individual.

C. *The International Shoe Doctrine and a Single Transaction*

It should be remembered that the *International Shoe* case set forth a standard which requires only that there be "certain minimum contacts" so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". This vague new test has been termed the "minimum contact–fair play" standard.[28] It will now be the writer's purpose to determine from an examination of the cases decided subsequent to 1945 whether or not a single isolated transaction by a non-resident individual or corporation within the state may be a basis for in personam jurisdiction. It is to be recalled that the whole purpose of the new standard was to discard any quantitative analysis of the number of contacts involved, and to substitute therefor a test which would deny or sustain jurisdiction solely on the basis of the quality of the act or acts engaged in. With these principles in mind, we will now turn to an examination of the cases.

In *Smyth v. Twin State Improvement Corp.*,[29] a Vermont statute provided that any foreign corporation which "makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont," or which "commits a tort in whole or in part in Vermont against a resident of Vermont" shall be deemed to be doing business in the state and shall be subject to the personal jurisdiction of the Vermont courts in any action arising from or growing out of such contract or tort. Service of process was authorized upon the secretary of state. A Vermont resident commenced a tort action in that state against a Massachusetts corporation, alleging that the defendant had negligently damaged the plaintiff's roof while attempting to repair it. The following question was certified to the court: "Has the State of Vermont the power to subject by statute to the jurisdiction of its courts a foreign corporation which commits a single tort in whole within the territorial limits of Vermont and against a resident of Vermont to actions and proceedings against it arising from or growing out of such tort?"

The court answered the certified question in the affairmative and in doing so made the following observation:

> "We recognize that there is a dual trend in jurisdictional decisions: in defining the court with jurisdiction, a trend from the court with immediate power over the defendant to the court where both parties may most conveniently settle their dispute; and in defining due process of law, a trend from emphasis on the territorial limitations of courts to emphasis on providing notice and opportunity to be heard. The implications of *International Shoe Co. v. State of Washington* are part of this dual trend . . . ."[30]

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[28]Foster, "Personal Jurisdiction Based on Local Causes of Action," 1956 Wis. L. Rev. 522 at 580 (1956).

[29]116 Vt. 569, 80 A.2d 664 (1951).

[30]80 A.2d at 668.

On the trend toward designation of a court where the dispute could be conveniently settled, the court said:

> "Where the cause of action arises out of the act done, the court of the locus is normally the forum of convenience for the settlement of the dispute. [citations omitted] . . . .
> "The probabilities are that the witnesses will be readily available; the law of the state where the act is done will control the consequences of the act. To require a resident to commence his action in a foreign jurisdiction on a tort committed where he lives, and to transport his witnesses to such other state might well make protection of his right prohibitive and in effect permit a foreign corporation to commit a tort away from its home with relative immunity from legal responsibility. [citations omitted] . . . . In many instances the cost of the remedy would have largely exceeded the value of its fruits . . . . To our mind, 'traditional notions of fair play and substantial justice' require that a nonresident corporate tortfeasor be compelled to defend, in the courts of this state, a cause of action arising out of its tort committed here . . . ."[31]

In regard to the "estimates of the inconveniences" to the non-resident in having to stand trial away from home, the court had the following to say:

> "[T]he court must balance the conflicting interests involved: i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed upon the defendant; or vice versa. In the present case no problem of undue hardship is involved, since it is relatively easy for a Massachusetts corporation to defend in a Vermont court.
> "Instances where foreign corporations commit a single tort at a great distance from home are doubtless rare. Should a case of undue hardship be presented, the doctrine of forum non conveniens is an adequate instrumentality through which justice can be achieved . . . ."[32]

The *Smyth* case held that a suit arising out of a single contact is a sufficient basis for personal jurisdiction over the non-resident. A local tort committed against a resident of the state furnished the basis for personal jurisdiction. It is to be noted that the court does not rely upon any other contacts which the non-resident had within the state. There is no doubt that a contract had existed between the plaintiff and the defendant with respect to the repair of the roof, but this is not developed as a basis for the result.

A recent case involving a breach of contract is *Compania de Astral v. Boston Metals Co.*[33] Maryland had a statute which authorized personal jurisdiction over foreign corporations in suits brought by residents on any cause of action arising out of a contract made within the state regardless of whether or not the corporation was doing business within the state. The Court of Appeals of Maryland upheld the validity of

[31]Ibid.
[32]Id. at 667.
[33]205 Md 237, 107 A.2d 357 (1945).

the statute as applied to a foreign corporation whose only contact with Maryland was the contract sued upon. The plaintiff was a Maryland corporation engaged in the salvage and sale of sea-going vessels; the contract provided for the sale of three such vessels, and the defendant was to make delivery of and payment for the vessels in Maryland. The question before the court was whether this single transaction was sufficient to sustain a basis for personal jurisdiction where the suit involved activities not inherently dangerous. In answering this question in the affirmative the court cited the *Smyth* case as authority.

Contacts which were confined to a single transaction were held to be sufficient to sustain personal jurisdiction over a foreign corporation in the Oklahoma case of *S. Howes Co. v. W. P. Milling Co.*[34] The statute resembled those which make "doing business" the basis for personal jurisdiction over non-residents. An Oklahoma corporation brought suit to recover upon an implied warranty against a New York corporation. The execution of the contract occurred outside of the state but performance (shipping the goods) was to be within the state. It was held by the court that the foreign corporation's contacts were sufficient to sustain personal jurisdiction over it in a suit to enforce obligations arising out of those contacts. The court's opinion is summarized by the following quotation:

> "It is argued that the factual situation in the instant case indicates only an isolated transaction, or a single transaction [which?] was not continuous in nature, and therefore, did not constitute 'doing business' within the State, subjecting defendant to local process. Such argument is not based upon reason and justice. Courts of a particular state should have jurisdiction over all disputes arising out of contracts made (or to be performed) within the state, regardless of the number of contracts of the defendant which were made (or to be performed) there. Moreover, the test as to what activities will subject the foreign corporation to suit is 'qualitative' not simply 'mechanical' or 'quantitative.' "[35]

Though some of the essential elements of the cause of action took place outside of the state, the Oklahoma court held that the facts "disclose sufficient grounds for holding that defendant, a foreign corporation, was doing business within the state of Oklahoma and amenable to local legal process thereby rendering it present for jurisdictional purposes."[36]

Unlike the statute in the *Howes* case, the statute in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*[37] purported to grant "Jurisdiction over foreign corporations *not transacting business* in this State". (Emphasis added.) The statute provided that "Every foreign corporation shall be subject to suit in this State . . . on any cause of action arising . . . Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used and consumed . . ." Erlanger

[34] 277 P.2d 655 (Okla. 1954).
[35] Id. at 657.
[36] Id. at 658.
[37] 239 F.2d 502 (4th Cir. 1956).

Mills placed an order with Cohoes at New York; the order was accepted in New York, and the goods were sold F.O.B. the New York plant. Erlanger commenced suit for alleged damages for defects in the goods and served an agent of Cohoes in accordance with the above statute. Though the facts of this case were almost identical to the facts in the *Howes* case, the court held the statute unconstitutional as applied to this case. While mentioning the *Smyth* and *Astral* cases, the court did not consider the *Howes* case. The court distinguished (but expressly refused to voice an opinion on their correctness) the *Smyth* and *Astral* cases, on the ground that "the jurisdictional contacts were not as lean as in the present case."[38] It is submitted that this case cannot be distinguished from the *Howes* case. The following language by the court may be said to be an argument for refusing to extend the doctrine of *International Shoe* to a single transaction within the state:

> "The Constitution which was ordained 'to form a more perfect union,' contemplates that the boundaries between the states shall have continued significance for some purposes though not for all. If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction. Individual states could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known.[39]

A case in which a non-resident *individual* was held to be subject to personal jurisdiction on the basis of a single local transaction was *State ex rel. Weber v. Register*.[40] The Florida statute involved was applicable to non-resident individuals, partnerships, associations, and corporations. It applied to those persons who sought to "carry on a business or business venture" in Florida where the suit arose out of any transaction "connected with or incidental to such business or business venture." The defendant, who was a non-resident individual owner of a Florida orange grove, listed it for sale with the plaintiff, a broker. In a suit for the broker's commission, defendant was served in accordance with the statute. The court held that the non-resident was engaged in a "business venture," and upheld the validity of the statute. This decision stands for the proposition that a non-resident *individual* who engages in a single transaction in the state may be made subject to personal jurisdiction in the courts of that state to enforce obligations arising out of that single transaction.

It would thus appear that a single isolated transaction by a non-

[38]Id. at 508.
[39]Id. at 509.
[40]67 So.2d 619 (Fla. 1953).

resident, individual or corporation, may serve as a basis for in personam jurisdiction. Though the *Erlanger* case purported to voice no opinion on those cases involving an isolated transaction, the language of the decision certainly indicated that the court questioned the correctness of decisions allowing jurisdiction on this basis.

D. *Estimates of the Inconveniences*

The implications of *International Shoe* in regard to the problem of inconvenience would appear to be a hybrid form of the doctrine of "forum non conveniens". In the conventional forum non conveniens pleas, the *defendant* must show that the balance of inconvenience is in his favor before the cause may be *transferred;*[41] whereas, under *International Shoe* there must be a clear balance of inconvenience in favor of the resident *plaintiff* before there may be *jurisdiction.* It is obvious that each case must be determined upon its own facts. In order to determine whether or not there is a clear balance of inconvenience in favor of the resident plaintiff, the factors pointed out in the *Smyth* case are relevant:[42]

1. The court of the state where the cause of action arose is normally the forum of convenience for the settlement of the dispute.
2. The probabilities are that the witnesses will be more readily available in that state.
3. The law of that state will normally control, and its courts are more capable of determining that law.

Thus, in *most* cases the place where the cause of action arose will be the proper forum, but upon a showing to the contrary the inconvenience aspect of *International Shoe* may be utilized to defeat jurisdiction.

IV. Conclusion

It has been the purpose of this comment to define the furthest limit in which this state, under its substituted service statute, may extend the personal jurisdiction of its courts. Though it is the opinion of this writer that, theoretically, individuals and corporations are to be treated alike, it is evident that there will continue to be a tendency on the part of judges to draw distinctions between the two.

As presently interpreted, then, in cases involving corporations, the Mississippi statute requires that the corporation be "doing business" under the pre-*International Shoe* tests. But there has been no necessity as yet in any case to apply the broader standard of *International Shoe.* Every decision subsequent to that landmark case involved facts that made it plain that the corporation was "doing business" in the more restrictive sense of the term. There is nothing in the cases that rejects the *International Shoe* doctrine, and it is submitted that it will be adopted

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[41] See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
[42] 80 A.2d at 666.

in a proper case. This being so, jurisdiction *can* be extended, under the *International Shoe* doctrine, to single transactions.[43]

As presently interpreted in cases involving individuals, the statute requires that the individual must be conducting an activity subject to the police power before process can be had upon him under the statute. Again, there has been no necessity to apply the new broader standard. But there is some indication[44] that the requirement that the activity be subject to the police power will be dropped in a proper case. However, there is again the possibility that the statute can be extended to cover a single transaction.

As to both individuals and corporations, the statute could be interpreted in the same manner so as to reach a single transaction, subject only to the limitations that "causes of action unconnected with the activities there"[45] are insufficient and the forum must be the one of convenience. But the constitutionality of this position on personal jurisdiction has not yet been passed upon by the Supreme Court of the United States.

Michael D. Haas

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[43]For an excellent discussion of the Mississippi decisions, see Foster, "Personal Jurisdiction Based on Local Causes of Action," 1956 Wis. L. Rev. 522, 554-556 (1956), where the author notes that the Supreme Court of Mississippi by its decision in Davis-Wood Lumber Co. v. Ladner, 210 Miss. 263, 50 So.2d 615 (1951), has, at least, convinced the Fifth Circuit Court of Appeals[a] that it did not intend to read the statute literally to apply to any suit arising out of a single act occuring in the state.

[a]Mississippi Wood Preserving Co. v. Rothschild, 201 F.2d 233, 238 (5th Cir. 1953).

[44]See Davis-Wood Lumber Co. v. Ladner, 210 Miss. 263, 50 So.2d 615 (1951), and the discussion of that case in this comment.

[45]326 U.S. at 317.

RECENT BOOKS

DRAFTING MUNICIPAL ORDINANCES. By Thomas A. Matthews. Chicago: Callaghan & Co., 1956. Pp. 457. $17.50

This volume is not a textbook concerning itself with the general principles of municipal law. It is designed for the specific purpose of aiding city attorneys and other interested persons in the practical job of drafting municipal ordinances. In reviewing the work, therefore, one must consider the limited purpose it was designed to achieve.

It is obvious that municipalities perform most of their functions by the enactment of ordinances; and that the enactment of proper ordinances is essential to the operation of municipal government, and to the public interest. It is equally obvious that the drafting of ordinances is a highly technical field, but one that is outside the day to day experience of most practicing attorneys and the average citizen. Therefore, an inexpensive reference book, in the nature of a form book with a brief discussion of the legal principles involved, which can save time and expense, and still insure a concise, clearly worded, and properly drafted ordinance, serves a practical need. This manual successfully attempts to provide such assistance.

The author states that he studied the ordinances of many cities and villages throughout the United States in his preparation of this volume. And from his study he has assembled under one cover, in complete detail, municipal ordinances covering every conceivable subject. And in making his selection, he has followed the general rule that the language used must be concise, the arrangements of sections must be logical to facilitate understanding and enforcement, the phraseology must be clear and to the point, and the ordinance must provide the most practical method of enforcement and must state clearly and definitely the legislative will.

The work is divided into two major sections, Part I, Text, and Part II, Forms. In addition, the book has an excellent index.

Part I deals with the first 106 pages of the manual. It covers, generally, a discussion of the powers of a municipality to enact ordinances, the rules of law to apply in interpreting ordinances, the phraseology and content of ordinances, and a discussion of the various types of ordinances and the formal requirements to be followed in their legal enactment. It also discusses the format required in the drafting of an ordinance and a municipal code, and particular problems in this field faced by new municipalities. The final chapter in this section is rather unusual in that it is a discussion of general considerations in the use of forms, and observations on the dangers and benefits to be obtained by using them.

Part II covers the remainder of the work, except for the index. It consists of forms of ordinances and a municipal code covering a wide range of subjects. The forms are arranged in a logical fashion. Forms for typical titles, preambles, enacting clauses, penalty clauses, amending provisions, repealing provisions, separability clauses, and so on. It in-

cludes complete forms of administrative ordinances, election ordinances, and ordinances dealing with appropriation and tax levy, municipal utilities, bonds, contracts, streets and sidewalks, business regulations and licensing, buildings and zoning, and general regulations such as parking meters, explosives, health, animals, and so on. The final chapter concerns itself with the presentation of a complete general municipal code outline, with the emphasis placed upon an example of the table of contents and the repealing clause.

All in all, this book fulfills the limited purpose for which it was written. It is an excellent handbook for the working draftsman of municipal ordinances. By pointing out rather vividly what is required of a properly drafted ordinance it can be of assistance to those who are called upon to interpret existing ordinances. It is recommended as a handbook in a specialized field.

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Vicksburg, Mississippi

MISSISSIPPI LAW OF DIVORCE, ANNULMENT, SEPARATE MAINTENANCE, CHILD SUPPORT AND CUSTODY AND AMENDED ADOPTION LAWS. By Earl L. Wingo. Hattiesburg, Mississippi.: Earl L. Wingo, 1957. Pp. 227.

In this single volume painstaking effort and exhaustive research have been combined to make a ready reference work embracing a full discussion of all important questions relating to the subject matter. The twelve separate causes for divorce; actions for annulment; proceedings for separate maintenance; proceedings for support for minor children, both temporary and permanent; proceedings for the care, custody and education of minors; petitions for the adoption of minors, changing their names, awarding rights of inheritance under the new adoption law of our state, are all exhaustively discussed in this very practical volume, and are adequately and intelligently indexed.

The author is the past president of the Mississippi State Bar Association, has had 35 years experience as a trial lawyer, has served as Chairman of the State Board of Bar Admissions and is a gifted author, having written "Mississippi Criminal Law and Procedure" and "The Illegal Trial of Jesus". His analytical mind, his tremendous ability for research, and the practical experiences that he has had during his years of practice particularly fit him for producing this volume which is destined to become very useful to the bench and bar of Mississippi.

We especially like the forms which have been compiled. They are of great practical value and their content and composition are sound and based on litigated cases which have withstood attack from able attorneys.

Cross-complaints, how decrees are enforced, attorney's fees, and amount of allowances are included in this volume. Finally, and probably most important, a full statement of recent Supreme Court decisions

through 88 Southern Reporter, Second Series, and the corresponding Mississippi Report citations are ably analyzed.

Wingo's *Mississippi Law Of Divorce, Etc.,* deserves a place on your library shelf and will aid you in simple as well as complicated domestic relations problems of every variety. You will find it a complete and succinct guide.

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MISSISSIPPI WORKMEN'S COMPENSATION. By Vardaman S. Dunn. Atlanta: The Harrison Company, 1957. Pp. 342.

In the wild, fast-growing weed-patch of today's Workmen's Compensation law, a book of this kind is extremely valuable for two reasons. First, it provides lawyers a compact little tool kit for working in the compensation field; and second, by integrating case pronouncements as they come down from the bench, by weaving them into a concise and narrative pattern, it tends to keep the growth of the law rational.

The great simplicity and certainty ascribed to Workmen's Compensation by its advocates in the early nineteen hundreds has never quite materialized in any state, nor will it in Mississippi. Workmen's Compensation has been, is, and, apparently, will continue to be, one of the most litigious inventions of this century.[1] And the more "clarifying" decisions that are given, the more points arise for new clarification, until the courts, on whom the burden falls, seem sometimes to be little more than human seeding machines, casting their grains in all directions to take root, grow, and ultimately come back again in ever-increasing harvests of controversy.

In the preface of this book, Vardaman Dunn states that since enactment of the Mississippi law in 1948, the supreme court has ground out 131 decisions on various phases of the legislation. As the state's industrial capacity picks up, and as the act is broadened, as it most surely will be in time, to cover virtually all employments rather than those with eight or more employees, as now, the rate will increase.

In other states, states with forty years and more on their Compensation Acts, this ever-accelerating process has too often resulted in a hopeless jungle of conflicting decisions and lines of cases. Some are old and narrow, infused with common law fault principles; some are new and liberal, even "radical"; and some are simply incomprehensible, having been intended for a problem that perhaps never materialized, or if it did, has ceased to exist. Looking at all this welter of inconsistent pre-

[1]In Mr. Justice Murphy's words, it is "deceptively simple and litigiously prolific." See Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947).

cedent, courts and lawyers can only guess as to what the law may be, or ought to be.[2]

Mississippi decisions have been good. There are faults which one might find in the act,[3] but the decisions of the supreme court under the act have been good. Most notable perhaps have been the cases of idiopathic causal factor, that is, the cases which involve a mixture of employment provocation with inherent physical infirmity such as heart involvement,[4] hypertension,[5] arthritis[6] and the like.[7] Those cases rank among the nation's most liberal. But however good a state's cases may be, they tend to get out of hand as they grow in numbers; they lose their organization and their pattern unless they are memorialized in integrated textual treatment as they are in this book. The law will change, of course, and the book will have to change and expand too, if it is to remain up to date,[8] but the great merit of such books is that by integrating isolated case holdings into narrative textual statement, the broad lines of pattern which may not be quite discernible in the individual cases emerge in bold relief in the book, so that new problems can be measured against that background, and as new decisions come down, they can more readily be fitted into their proper niches of the expanding pattern.

The book does all this. In 189 pages of concise text Mr. Dunn has

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[2]"This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary, there is so much authority it drowns him. It is a sea, vast and vascillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything if he lives so long." Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E. 2d 685, (Ohio 1952) (not a Compensation case, but very apt just the same).

[3]As noted earlier, the Act (§3) exempts those employments with less than eight workmen. This of course places a large segment of the Mississippi timber operations outside the Act. Equally hard to justify is the exclusion by amendment to § 3 in 1956 (Gen. Laws 1956, c. 344, p. 483) of "any individual performing service in, and at the same time of, the sale of newspapers or magazines to ultimate consumers . . ." Benefits, universally low in Workmen's Compensation, are beneath the national average when pegged in Mississippi at an $8,600.00 maximum. Particularly difficult though, is the untreated plight of a widow whose husband dies from some cause other than the accident for which he was drawing compensation. The hernia provisions of the statute, requiring "that there has been no descent or protrusion on the hernia or rupture prior to the accident for which compensation is claimed" (§ 8 (f) 3), are not as broad as they might be. There seems no very good reason to exclude employment-caused aggravation of pre-existing weakness here any more than in other areas referred to in notes 4, 5, 6, and 7, *infra*, where compensation is regularly allowed.

[4]See Schilling v. Miss. State Forestry Comm., 85 So.2d 562 (Miss., 1956); Mississippi Products v. Gordy, 224 Miss. 690, 80 So. 2d 793 (1955); Pearl River Tung Co. v. John, 83 So. 2d 95 (Miss., 1955).

[5]See Avery Co. v. Hall, 224 Miss. 51, 79 So. 2d 453 (1955); Cowert v. Pearl River Tung Co., 218 Miss. 472, 67 So. 2d 356 (1953).

[6]See Federated Mut. Implement & Hdwe. Ins. Co. v. Spencer, 219 Miss. 68, 67 So. 2d 878 (1953).

[7]See Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So. 2d 645 (1952) (pre-existing malformation of the blood vessels in the back held aggravated by employment stresses on the back); Mississippi Federated Cooperatives v. Jefferson, 224 Miss. 150, 79 So. 2d 273 (1955) (syphilitic condition held lighted up by a fall at work); Tate v. Dr. Pepper Bottling Co., 220 Miss. 311, 70 So. 2d 602 (1954) (pre-existing congenital back cyst held aggravated by employment).

[8]The book carries a place for later pocket parts.

woven the Mississippi statute and the Mississippi decisions into form. It is not a book of barefaced, meaningless annotations to the statute, as some state manuals are. Neither is it an excursion into philosophy and metaphysics as others are. It is just what its author says it is in the preface, "a reference guide to the practical application of the law to the every-day problems of administration and practice before the Compensation Commission and the Courts." It is a good one too, stating, apparently, all the law there is in Mississippi, all the way from the point of hiring through disposition of claims in the Compensation Commission and appeal. Included in the book, in appendix form at the back, are the official text of the Compensation Act, the Rules and Regulations of the Workmen's Compensation Commission, the Commission's official forms, and for good measure, some additional suggested forms.

Some lawyers will lament the absence of a table of cases, which would make it somewhat easier to use, but for now, with only 131 decisions, and with a good table of contents and a good index, the book should serve the need very well.

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THE LAW OF POOLING AND UNITIZATION, VOLUNTARY-COMPULSORY. By Raymond M. Myers. New York, New York: Banks and Company, 1957. Pp. 833. $25.00.

The words "pooling" and "unitization," are frequently used interchangeably by the uninitiated. The term "pooling" is used to indicate the bringing together of small tracts of land to make up a drilling unit under applicable spacing rules and for which a permit to drill a well may be issued. "Unitization," on the other hand, is the term used to describe the joint operation of all or some part of a reservoir.[1] Both pooling and unitization are natural concomitants to any conservation program. Pooling is utilized to avoid the drilling of excessive wells which would result in waste; unitization accomplishes essentially the same conservation end and permits owners in a common pool or reservoir to engage in secondary recovery operations economically. Unitization from a conservation standpoint produces excellent results, reservoir energy can be conserved and secondary recovery procedures can be introduced wherever appropriate. Under unitization the best engineering practices

[1]Justice Ethridge speaking for the Mississippi Supreme Court in Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85 (1952), suggestion of error overruled in 214 Miss. 857, 59 So.2d 844 said, on speaking of the Mississippi Oil and Gas Conservation Act: "This type of legislation is usually defined as a compulsory pooling statute, under which owners of small or irregularly shaped tracts can be required by the Board to develop their lands as a single drilling unit for conservation purposes. It is contrasted with a compulsory unitization statute, which applies ordinarily to joint operations on a large scale, such as those covering an entire oil or gas pool."

can be put into operation without regard to property lines and a planned program for a reservoir can be executed with excellent conservation results.

In order to realize the maximum potential of any conservation program it seems apparent that both compulsory pooling and unitization should be available to the state regulatory body. Presently the following states have compulsory pooling provisions in their conservation acts: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Michigan, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. Compulsory unitization exists in varying degrees in Alabama, Arkansas, Florida, Georgia, Louisiana, Oklahoma, Nevada, and Washington. Authority to enter into voluntary unitization agreements has been granted by a number of states and the acts generally exempt these type agreements from the operation of the state antitrust laws.

In Mississippi, the state conservation statute provides for the execution of voluntary unitization agreements where the agreements are made in the interest of conservation of oil or gas and when the agreements are approved by the state oil and gas board. These agreements in Mississippi are specifically excluded from the effect of the state antitrust statutes. One is not sure, however, whether or not compulsory unitization exists by implication in the Mississippi conservation statute. Early Mississippi statutes contained no provisions for compulsory poolings; in fact numerous attempts were made to enact such legislation prior to 1948; all were unsuccessful. On the other hand, the fact was that the Mississippi Supreme Court in *Superior Oil Co. v. Berry*,[2] found that compulsory pooling existed in Mississippi prior to the 1948 amendment to the conservation act where no express provision for compulsory pooling existed in the statute. Apparently Mississippi has been the only state to find implied statutory authority to force pooling where the conservation law was silent on the subject. Can one then say that compulsory unitization does not exist presently in Mississippi? Apparently not. It would appear that it may exist by implication in the conservation act. Its constitutional validity would rest on the same basis as compulsory pooling. The declared policy of the Mississippi Conservation Act is the prevention of waste in the production and utilization of oil and gas and to safeguard, protect and enforce the correlative rights of owners in a common source or pool of oil and gas. The statute itself singles out for preferred treatment voluntary unitization agreements when they are executed for the prevention of waste by extending to the signatories apparent immunity from state antitrust violation. It appears that, in a proper case, the Mississippi Supreme Court can find that the conservation statute, by implication, does contain compulsory unitization, especially since compulsory unitization will carry out, constitutionally, the declared policy of the act in preventing waste. There could be no taking of property without due process of law where the police power of the state is reasonably exercised to prevent waste. Sufficient case law exists to support such a decision as being constitutionally sound.

[2]216 Miss. 664, 63 So.2d 115, 64 So. 2d 357 (1953).

Raymond M. Myers is no stranger to the oil and gas industry in Mississippi. He is recognized as a thoroughly competent scholar and one of the leading national figures in the oil and gas business today. He is an author of recognized standing and has contributed to the *Mississippi Law Journal.*

Mr. Myers paints the background of conservation and gives a historical sketch of the development of the unitization idea in the first two chapters; he also discusses pressure maintenance and secondary recovery operations and the legal effects without unitization. Chapters three and four deal with the creation of units, the community lease and pooling, and the negotiation and execution of voluntary unit agreements respectively.

The form and legal significance of the unit agreement is treated in great detail in chapter five. A fairly typical operation agreement is selected as the form of the modern agreement. The agreement used is one which was developed by experience and its provisions adopted by many operators and their attorneys. The agreement is nicely handled from the standpoint of one who is interested in researching a particular provision. The clause itself is set forth in full and it is followed by an explanatory comment. Some of the clauses discussed include: Determination of Participation, Qualified Tracts, Wells and Leasehold Equipment, The Plant, Expenditures, Insurance, Unit Operators, Taxes, Title, Regulatory Bodies and many others peculiar to this type agreement. The procedure for securing the approval of voluntary unit agreements by regulatory authorities is the subject of chapter six and this material includes the type evidence to be submitted by the landman, geologist and petroleum engineer.

Compulsory pooling and unitization along with the procedure for hearings before regulating agencies to secure such orders are in two chapters. This material covers a detailed discussion with many annotations to particular jurisdictions on the subject. Taxation, Public Lands, Antitrust Laws are all the subject of specific chapter discussion. The nature of the unitized title and legal problems incident to the operation of a unit are included in the last chapter of text. A copious appendix is contained in the book covering a great variety of forms along with a topical and word index.

Anyone engaged in oil and gas practice should have a copy of this comprehensive book available to him. Mr. Myers has maintained his usual high degree of competency and has written a most useful book.

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THE SOVEREIGN STATES. By James Jackson Kilpatrick. Chicago: Henry Regnery Co., 1957. Pp. 347. $5.00

The author of this book is editor of the Richmond, Va., *News Leader*. In a series of editorials in 1955 he resurrected the long dormant doctrine of state interposition and urged it as an answer by the South to the Supreme Court school segregation decision. It is a measure of the anger, emotionalism, and desperation with which much of the white South reacted to that decision that some ten state legislatures actually enacted solemn resolutions purporting to interpose the authoriy of the state and even to nullify the Court's decision. This book is primarily a defense of the doctrine of interposition.

It is an almost infallible rule that, whenever a newspaperman expounds on a legal subject, what he says will be unreliable, and this book is no exception. In addition to not being a constitutional lawyer, Mr. Kilpatrick is further handicapped in that his whole argument is predicated upon an untenable thesis, namely, that the government provided for by the Constitution "was intended to be . . . a federation of sovereign States jointly controlling their mutual agent, the Federal government." (p. 148) This thesis is untenable because it is historically untrue.

Under Article II of the Articles of Confederation each state retained its sovereignty and independence, and every power, jurisdiction and right which was not expressly delegated to the United States. This precluded the existence of any implied powers. The powers which were expressly delegated to Congress were limited, but even as to these, there was no power of enforcement. The central government, with rare exceptions, operated not on individuals but through the states, and its authority was effective only so far as, and no farther, than the states were willing to accept it. The states remained free to ignore the central government with impunity, which they did, in spite of their pledged word in Article XIII that they would abide by the determinations of Congress on all matters delegated to it. Under the Articles, there existed in America a compact of sovereign states with a mutual agent. And history records that it was a failure.

The fundamental purpose of the Constitutional Convention of 1787 was to change this system. The founding Fathers decided at the outset that no mere federation would suffice. Instead, they created a national government which would operate directly on individuals, gave it vastly increased sweeping powers, and created a national executive and a national judiciary for their enforcement. Severe limitations were placed on the sovereignty of the states, and the supremacy of the central government over the states was clearly and expressly set forth. With deliberate intent and with great care, the Founders remedied the defects of the system under the Articles. And because the Constitution was fatal to state sovereignty, they bypassed the state governments and went directly to the people for ratification of the great transition. In the campaign for ratification the principal basis of the opposition to the Constitution was that it would destroy the sovereignty of the states.

The campaign against the Constitution did not end, however, with

its ratification. The opponents who had insisted so strongly that the Constitution would destroy state sovereignty discovered suddenly that it was an idle thing which had been done after all, that nothing was really changed, and that America still had the same system the Founders had set out to replace——a compact of sovereign states. From this "noxious doctrine", to use Corwin's phrase, were logically spawned the alleged rights of interposition and secession. Never sound legally or historically, these doctrines eventually confronted superior physical power, and were finally abandoned when the Civil War was lost. State sovereignty was succeeded by the lesser claim of "states' rights," which continues to this day as a strict construction approach to national power, allegedly required by the Tenth Amendment. Now Mr. Kilpatrick brings us full circle by dredging up the old discredited doctrines of compact and interposition to revive historical error and to give false hope to the credulous.

The title of the book, then, is a complete misnomer, for the truth of the matter is that the states, in relation to the national government, have not been sovereign in any real sense of the word since 1789. And yet the book itself is so skillfully written that it is almost sure to be persuasive, even convincing, to anyone who is not sufficiently at home in constitutional law and history to recognize the half-truths and fallacies for what they are. These are so numerous in fact, that it would take a book at least as long as Mr. Kilpatrick's to answer them all. A few illustrations will have to suffice.

Thus, it is said that state sovereignty is proved by Article V of the Constitution which, according to Mr. Kilpatrick, gives the states alone the power to amend the Constitution. Actually, as careful reading of Article V will reveal, the amending process is dependent upon Congressional action, the states are not empowered to submit amendments for ratification, and Congress can bypass the state legislatures by providing for ratification by conventions. Again, Mr. Kilpatrick disparages the omission of the word "expressly" from the Tenth Amendment as being unimportant. Of course, as any competent lawyer knows, the distinction between express and implied powers is a vital one. The word "expressly" was intentionally omitted from the Tenth Amendment for the very purpose of permitting the exercise of implied powers which were prohibited under the Articles because the Articles contained the word. And the defenders of state sovereignty in Congress in 1789 recognized the importance of its inclusion or omission, even if Mr. Kilpatrick does not, since they tried repeatedly, but without success, to insert the word in the Amendment. Mr. Kilpatrick discusses extensively the arguments of the Virginia court in *Martin v. Hunter's Lessee* denying the authority of the Supreme Court to review state court decisions interpreting the Constitution and national law. But he completely fails to mention that Justice Story demolished these arguments in one of the most logically unassailable opinions ever written by any judge. Mr. Kilpatrick recognizes the objection against interposition that it would breed constitutional chaos, that the Constitution could not be subject to forty-eight different interpretations and still be the "supreme law of the land." Although he recognizes it and indicates he is about to offer an answer, in fact no answer is ever offered. And for a very good reason, too. There is

no answer. But, Mr. Kilpatrick reassures us, interposition would never be arbitrarily or frivolously invoked in cases of small importance, but only as a last resort in cases of a deliberate, palpable and dangerous breach of the Constitution by the national government. The fact is, however, that the whole sorry series of state defiances which he parades as examples of interposition did not involve national breaches of the Constitution at all, but simply vigorous state disagreement with some particular exercise of a legitimate national power.

Rather than prolong the rebuttal, however, perhaps it would be better simply to agree with Mr. Kilpatrick's own very accurate description of his book. In the preface he says, "May it please the court, this is not a work of history; it is a work of advocacy. The intention is not primarily to inform, but to exhort. The aim is not to be objective; it is to be partisan." And perhaps the best refutation of Mr. Kilpatrick's resurrection of the old shibboleths has been given by those Southern lawyers who have had better sense than to invoke the interposition resolutions as a defense in court.

One final thing should be said. Mr. Kilpatrick is a master of the language and the possessor of a literary style which makes one envious. The pity is that he has devoted his talent to such baseless causes as state sovereignty, compact and interposition, for there is great need for the intelligent use of such ability as he has. The South has problems and points of view in the segregation controversy which are not yet understood in other parts of the country. The smug self-righteousness and the easy solutions of many non-Southerners call out for a trenchant pen. In the broader area of national-state relations, there is much which can be said in favor of a larger role for the states. But no constructive contribution is made in either area by reviving, as Mr. Kilpatrick does, extremist conceptions of the American system of government, conceptions which were untenable when first advanced and which today are simply ridiculous.

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